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Edited by Lynn Roe, Secretary to the Director

Minutes of the Meeting of the
Arizona Game and Fish Commission
Friday, September 17, 2004 – 9:00 a.m.
Manor House Conference Center
415 East Highway 70
Safford, Arizona 85546

PRESENT: On Site (Commission)

Chairman Chilton
Commission Joe Melton
Commissioner Michael M. Golightly
Commissioner William H. McLean

(Director's Staff)

Director Duane L. Shroufe
Deputy Director Steve K. Ferrell
Assistant Attorney General Jim Odenkirk
Assistant Attorney General Shelley Cutts

PRESENT: Via Phone

Commission W. Hays Gilstrap

Chairman Chilton called the meeting to order at 7:00 a.m. Members of the Commission introduced themselves and Chairman Chilton introduced the Director and the Director's staff. Commissioner Gilstrap will be participating in this meeting via telephone during the afternoon. The meeting followed an agenda dated August 27, 2004.

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1. Executive Session

a. Sale or Lease of Real Property. Discussion and consultation with legal counsel and Department staff concerning negotiations for the sale or lease of real property and associated water rights pursuant to A.R.S. § 38-431.03 (A)(7).

b. Legal Counsel. Discussion and consultation with legal counsel in accordance with A.R.S. § 38-431.03 (A) (3) and (4) in order to consider its position and to instruct legal counsel regarding the Commission's position on *Montoya v. Manning*, CIV98-0239 PHX RCB; *In Re General Stream Adjudication for the Little Colorado River and Gila River*; *Mark Boge v. Arizona Game & Fish Commission & Shroufe*, CIV2000-020754; *Ameduri and Yee et. al. v. U.S. Forest Service et al.*, U.S. District Court No. CIV 02 2495 PCT FJM; *Bar D Cattle Co. v. Shroufe*, CIV2002-0872; *Phelps Dodge Corp. v. Arizona Dept. of Water Resources*, LC2003-000243-001DT; *Arizona Zoological Society, et. al. v. BLM, IBLA appeal no. 2002-412*, *Center for Biological Diversity v. Norton*, 03 CV-01558 RCL, and *Audubon Society of Portland v. USFWS*, CV04-670-KI.

c. Legal Counsel Regarding the Silverbell Bighorn Sheep Herd. Discussion and consultation with legal counsel in accordance with A.R.S. sections 38-431.03(A)(3) and (4) in order to consider its position and instruct legal counsel regarding the Commission's position on possible settlement or litigation over the damages associated with the epizootic episode in the Silverbell Bighorn Sheep Herd.

d. Consideration of the Requirements of R12-4-114(D) as they Apply to Future Big Game Drawings for Hunt Permit-Tags in Light of the July 13, 2004, U.S. District Court Order in the Matter of Montoya v. Manning, CIV98-0239 PHX RCB and obtain legal advice from legal counsel on this matter pursuant to A.R.S. section 38-431.03(A)(3) and (4).

e. Personnel Matters. Discussion of personnel matters, including the Director's goals and objectives pursuant to A.R.S. § 38-431.01 (A) (1). The Commission may decide this matter in the public meeting or defer a decision to a later date.

Motion: Melton moved and McLean seconded THAT THE COMMISSION GO INTO EXECUTIVE SESSION.

Vote: Unanimous

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Meeting recessed at 7:02 a.m.

Meeting reconvened at 9:00 a.m.

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DIRECTOR SHROUFE: Chairman Chilton and Commissioner Gilstrap requested that agenda item No. 10, Conservation of the Cactus Ferruginous Pygmy Owl, be moved from this morning to right after the time certain No. 13, License Revocations. Also, as noticed to the public yesterday, Saturday's Commission meeting field trip was cancelled due to logistics.

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2. Litigation Report

A copy of the Litigation Report was provided to the Commission prior to today's meeting and is included as part of these minutes.

MR. ODENKIRK: The purpose of the Litigation Report is to allow the Commission to ask any questions of the ongoing litigation and for the Attorney General's Office to provide any non-privileged information about litigation to the public. Litigation Reports have are available to the public here today. There has been little development since the August meeting and those of significance have been noted in the report.

COMMISSIONER MELTON: In the Montoya case, I would like you to give us a brief overview of the Commission and the Department's liabilities in that particular case as to the rulemaking that we're going to be doing today.

CHAIRMAN CHILTON: We could do that right now or we could have that at the time that we deal with those issues.

COMMISSIONER MELTON: At the time that the issues come forward will be fine.

COMMISSIONER MCLEAN: With regard to that matter which is identified as, Phelps Dodge Corporation versus Arizona Department of Water Resources, could we request the Director invite the Director of ADWR, or his designee, to be present and give us a presentation at the public session on this item next month.

COMMISSIONER GOLIGHTLY: Mr. Odenkirk, who is Conservation Force.

MR. ODENKIRK: I know little about Conservation Force. As I understand it they have some involvement in providing guiding services around the country.

COMMISSIONER GOLIGHTLY: Do you know who the principals are.

MR. ODENKIRK: I do not.

COMMISSIONER GOLIGHTLY: I'd like to know that; I've been asked recently. John Jackson is one of the owners of Conservation Force. John Jackson is a past president of Safari Club International. I just wonder what their initial role was in the suit, defending U.S. Outfitters or not defending, but fronting the information, the research, etcetera. I was under the impression that Conservation Force was doing all the work, and wondered what their motive was.

MR. ODENKIRK: I can investigate more information about Conservation Force and their role in this litigation and provide that to you at a later time.

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3. An Update on Current Issues, Planning Efforts, and Proposed Projects on State and Federal Lands in Arizona and Other Matters Related Thereto.

Presenter: Bob Broscheid, Habitat Branch Chief

A copy of the Lands Update report was provided to the Commission prior to today's meeting and is included as part of these minutes. The update addresses decisions or activities since the August 2004 Commission meeting. This update is in fulfillment of the Department's commitment to brief the Commission on a regular basis regarding decisions and actions on all state and federal lands in Arizona.

CHAIRMAN CHILTON: We were going to take a field trip and see that Pinaleno Project, and we were going to see the effects of the burn, and things have intervened to prevent that from happening. Could you give us a little information that we might otherwise have received on site?

MR. BROSCHEID: You were probably going to see the Proposed Pinal Ecosystem Restoration Project (PERP). The Department has been actively involved over the past several months as a team member with the Coronado National Forest, Fish and Wildlife Service, and other non-governmental organizations to propose projects that would reduce the risk of catastrophic fire up around Mount Graham. This PERP project encompasses about 5,500 acres. A defensible corridor and fire break along the Swift Trail and Bible Camp Roads will be created. A larger

area beyond the defensible corridor will be treated with a prescription similar to a previous project called the Pinaleno Ecosystem Demonstration Project, and that pretty much focused on higher recreational areas and reducing the risk of fire going through structures such as the communication towers, and also to develop a 200 acre silviculture treatment near Bible Camp to promote old growth Douglas fir forests. You may remember that that was the part of the forest that was hit hard by the Bark Beetle infestation. So the Department is actively involved in that project. The Forest Service anticipates having proposed action developed by October of this year, and a scoping report available for public review and comment by November 30; hopefully that project will continue. I'm sure you would have also seen the effects of the recent Nuttall fire. That burned a significant amount of land, around 20,000 acres, predominantly the north facing slope. The south facing slopes of the Pinaleno Mountains are still at risk and the Forest Service has determined that there's still the potential for fire and also impacts to the Mt. Graham red squirrel habitat as well. They had to stop the project, evaluate the effects of the fire, and then incorporate any changes into the PERP to make sure the fire didn't burn that area. Most of the areas have not been impacted and this project is going to continue to move forward.

CHAIRMAN CHILTON: What was the impact on the red squirrel habitat, and what have the red squirrels done as a result.

MR. BROSCHEID: The preliminary research and evaluation by the Department, Fish and Wildlife, and Forest Service staff, is that some acreages of Mount Graham red squirrel were impacted and others that were not. They're still trying to determine, as a result of the Spring survey, where those nests are. So they're still trying to assess that information, and I'm not the authority on it, but I can provide the Commission with an impact assessment on the red squirrel habitat up there as far as what specifically were the direct impacts and also the indirect that's being anticipated from that fire.

GERRY PERRY (Region V Supervisor): In answer to that question, we're doing a squirrel survey this week. There should have been a briefing memo provided for you on the status of the population, as we know it today, but this next week a survey will be conducted. I also brought with me some briefing materials provided by the Forest Service at the last minute. They thought that they were going to be on that tour tomorrow, but since that has been canceled, I brought their briefing materials that may answer some of your questions.

COMMISSIONER MELTON: Mr. Broscheid, I have a couple questions. One relates to the access to the Boquillas Ranch. I've received some calls about it being closed down. The other deals with the meeting you had with BLM in Yuma on Wednesday night. Would you give us a couple brief explanations of where we stand on both of those issues.

MR. BROSCHEID: I can provide an update on the meeting we had in Yuma regarding the BLM planning, but have to refer to Director Shroufe on the Boquillas Ranch issue. On Wednesday of this week, we met with the Bureau of Land Management, the Deputy State Director, and also the Phoenix Field Office Manager, as a follow up to the Commission meeting in August and Mike Taylor's commitment to brief the Yuma Valley Rod and Gun Club and address their concerns about the ongoing planning effort. It was a very productive meeting a lot of the Rod and Gun Club's concerns were right in line with what the Department's trying to deal with in this

planning process. Most of the concerns had to deal with the proposed land use allegation of managing for wilderness character. We're working with BLM to address our concerns related to wildlife management and wildlife related recreation or public access to those lands. It was a good meeting.

DIRECTOR SHROUFE: The Big Boquillas access issue has been ongoing for probably the last month. Department personnel including myself have been in contact with officials from the Navajo Nation trying to sort this out and make sure that as much of that area is open to our hunting public as possible. We thought that in our deliberations with the Navajo Nation and with their news release that the gates were going to be opened for access through the property. Then we found out the middle of last week that those gate locks had actually been removed and moved up the road about a mile and put back on. We got in direct contact again with the Executive Director in the Natural Resources Department and they went on a tour of the Boquillas yesterday and in the afternoon and we met with them. We met with the Executive Director, members of their Agriculture Department, and members of their Wildlife Department. Again, we came to an agreement, the same agreement that we had a week and a half ago when they made that news release as to what areas would be open to vehicular traffic and what areas would be open to just walk-ins. When we left that meeting at four o'clock yesterday afternoon, we were convinced those messages could be relayed down to the lessee and the people working for the lessee on the Big Boquillas. Access will be there and will be open. There will be a small area around Rose Wells that will be closed to vehicular traffic, but walk-in traffic will be allowed. It's basically private land, but the reason they don't want vehicles in there is because of a rainstorm they had this summer that washed a lot of the road and also washed a huge fuel tank out. They have an environmental spill up there that they're working on trying to contain and remediate. So we committed our time and personnel to help them identify those areas where vehicular traffic will be stopped, and only walk-in traffic will be allowed. From the agreement yesterday, the Boquillas should to be open adequately for our hunters. Now how that portrays on the ground this next week, we'll just have to wait and see. We seem to be getting very good cooperation from the Navajo Nation. The problem is with their communication to their lessee and I hope they've got that solved.

COMMISSIONER MELTON: I'm receiving lots of calls from people with hunt permits who want to go scout and can't get on. There were a lot of problems occurring and I know the Department has been working on it and trying to get it resolved. Hopefully this thing will all be resolved before they get up there and try to find a place to hunt.

DIRECTOR SHROUFE: I'm convinced, policy-wise, it has been resolved. Now how that gets relayed down on the ground, and how much cooperation there is this next week, we're hoping for the best. I committed to the Executive Director of the Natural Resources Department that I would sit down with him and work out an access agreement to ensure that this doesn't happen every year.

CHAIRMAN CHILTON: Back to our neighboring situation here. Could we get a report on the status of the red squirrel, and also what's happening with the spruce bark beetle infestation. If the fire had a beneficial impact, we'd like to know about it. I noticed there's someone from the Coronado Forest Service here. Perhaps we could introduce her, and maybe she could tell us

something about what's going on in terms of Mt. Graham and about public access to it after the fire?

MINDY ROTE: I'm the Acting District Ranger at the Safford Ranger District and I've been here for about a month and a half. The fire actually had some beneficial effects. It was just under 30,000 acres and about 10 percent of that was classified as severe burn, about 40 percent was moderate, and that leaves about 50 percent that was either unburned or low intensity burn. We've had some flooding related problems, but they've been relatively minor. I can't answer your question regarding the spruce bark beetle, but my gut tells me there were some beneficial effects that the fire had on that problem. The loss of trees in some of our campgrounds was significantly less than what we had anticipated. We'll be taking out only about 34 trees from campgrounds in October. The red squirrel refugium is on the Coronado National Forest's fiscal year 2005 program to begin to analyze whether we need to do something different in the refugium. At this point, we've been talking to the Fish and Wildlife Service and also some of the Indian Tribes. What the Forest Service is proposing today is that we open the refugium to day use and that we have non-motorized use in that area. A road called the 507 Road was opened up as part of the fire control. There was a dozer line that was put in along that old road through the refugium. The Forest Service would like to maintain it as administrative access for future fire access and other administrative uses.

CHAIRMAN CHILTON: Is there anything we can do to support you so that you can do that. We would like to see the refugium open for day use and we'd like to know about your pheromone project to control those beetles. They were devastating the place.

MS. ROTE: I will do my best to get more information for you on both of those issues. I'm sure there's a role that you can play to help in the refugium and we'll be sure to include you in that.

CHAIRMAN CHILTON: Please be sure to include Gerry Perry closely and of course Bob Broscheid, but we're quite interested in being part of the solution here.

MR. BROSCHEID: We'll certainly work with the Forest Service and Region V staff to prepare an overview update on the situation, including projects and programs, and the Department's involvement in the refugium recovery team.

MR. PERRY: There is a document in your briefing items prepared by Tim Snow referencing the status as we know it of the squirrel and the effects of the fire, which may answer some of your questions.

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4. Request for Commission Approval of a Cooperative Agreement Between the Bureau of Land Management and the Arizona Game and Fish Commission.

Presenter: Bob Broscheid, Habitat Branch Chief

MR. BROSCHEID: In 1999, the Commission approved a cooperative agreement between the

Bureau of Land Management and the Arizona Game and Fish Commission that would serve as a mechanism to facilitate and streamline cooperative financing of mutual projects between the Commission and the BLM. This agreement will expire on September 30th, 2004, and the Department and the BLM wish to continue this level of cooperation and enter into a new agreement. As with the original agreement, one of the principle objectives is to provide a more efficient mechanism for transfer of funds between the agencies for the routine cooperative projects and activities that have been previously approved through either project statements, habitat management plans, the memorandum of understanding, or other Commission approved plans and project documents. The new agreement includes the same basic terms and conditions, and will cover all cooperative projects between the two agencies. Other actions that are not tied to existing Commission approved budgets will be tiered to this agreement and will continue to be presented to the Commission for your approval.

Motion: Melton moved and McLean seconded THAT THE COMMISSION VOTE TO APPROVE THE NEW COOPERATIVE AGREEMENT BETWEEN THE BLM AND THE COMMISSION TO SERVE AS AN UMBRELLA AGREEMENT FOR FUTURE TAX ORDER BETWEEN THE TWO AGENCIES AS ATTACHED OR AS RECOMMENDED OR APPROVED BY THE OFFICE OF THE ATTORNEY GENERAL.

Vote: Unanimous

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3. Continued - An Update on Current Issues, Planning Efforts, and Proposed Projects on State and Federal Lands in Arizona and Other Matters Related Thereto.

Public Comment

BRIAN DOLAN (Arizona Desert Bighorn Sheep Society (ADBSS): I noticed on the Lands Update that I didn't see anything on the Black River burn and I would like to know what's going on with that, whether or not it's still a priority of the Commission. I thought it was earlier in the year and it certainly is for ADBSS. We still have tag hunt money set aside to participate in that project, and would hope that Mr. Broscheid could enlighten us on it's status.

MR. BROSCHEID: The Black River burn is still a high priority project. We met with the ADBSS a couple of months ago to identify all of the issues along with their consultant. One of the issues we're facing are the work load constraints that are on Forest Service staff right now in dealing with urban interface issues; thinning the areas of dense forests around communities. The second is the level of NEPA involvement that's going to occur for this project, as well as endangered species and consultation for this project. We discussed that this would be a significant investment of funds as well as ADBSS, Forest Service, and Department staff on this project. The way we left it was that we would continue to pursue this when the time, funding, and everything was there on this project. We still consider it a priority project and we're aware that money is still set aside for this project, but some of the estimates that came in were about \$100,000 to complete the NEPA. I think it was 2,000 acres. It could potentially be reduced down to a less effective project area size. On steep slopes of Rocky Mountain bighorn sheep

habitat, the concern is that once the fire goes through, if it's a hot fire, it would cause sediment runoff into the stream, therefore affecting these endangered species. We have been trying to work on how we can move this project forward and at the same time, perhaps waiting for a more opportune time to approach the Forest Service. That's where we left it following the meeting with ADBSS on the Black River Burn Project. For this product to move forward, the significant mitigation could potentially reduce the size of this project.

CHAIRMAN CHILTON: We want to try to make this happen. People work and work, and Brian and his group work to try to get this project going and there they stand, suspended in time for who knows how long, and then they begin to wonder if all their work was worth it. Let's try to make it happen because we'll wait until it becomes a lightning fire, and then it will be out of control, so let's try to advance this project.

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5. Request for the Commission to Approve the Acquisition by Donation of the Mason Property Located near the Gila River in Yuma County, Arizona.

Presenter: Bob Broscheid, Habitat Branch Chief

MR. BROSCHIED: The Department was offered a donation of approximately 20 acres of private property adjacent to the Quigley Wildlife area. The property provides high value wildlife viewing opportunities as well as potentially valuable legal access to the Commission's Quigley Pond Wildlife Area. If approved by the Commission, the Mason Property will be incorporated into the Quigley Wildlife Area. The Habitat Branch will be meeting with the landowner to develop an agreement to transfer this land to the Commission, while allowing Ms. Mason to remain as a tenant on that property until she determines to vacate.

Motion: Melton moved and McLean seconded THAT THE COMMISSION VOTE TO APPROVE THE ACQUISITION BY DONATION OF THE MASON PROPERTY, CONSISTENT WITH THE PURCHASE AGREEMENT AND AS RECOMMENDED BY THE OFFICE OF THE ATTORNEY GENERAL; THIS ACQUISITION IS SUBJECT TO THE APPROVAL OF THE GOVERNOR.

Vote: Unanimous

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6. Request for the Commission to Approve the Agreement with the Arizona Department of Public Safety for the Purpose of Operating and Maintaining a Portion of the Commission's Three Points Shooting Range, Pima County, Arizona.

Presenter: Bob Broscheid, Habitat Branch Chief

MR. BROSCHIED: The Arizona Department of Public Safety has requested a new agreement or renewal of an existing agreement for a portion of the Three Points Shooting Range located south of Tucson. The Commission has an agreement with the Tucson Rifle Club for the entire 1,281.5

acres of the range for operation and maintenance of a public shooting facility. The purpose of this agreement is for DPS to develop, construct, and maintain a five-acre public pistol and shotgun shooting range complex. This is not a new use. In 1980, the Commission and the Tucson Rifle Club approved a 10-year lease with DPS for the same area, and a second 10-year lease was approved in 1994. The current agreement between the Commission and the club already provides authority for the Commission to enter into the attached agreement with DPS for the pistol and shotgun complex. Facilities will be built by DPS and will be available for use by the public, but not in use by the Department of Public Safety. Furthermore, the club agrees to manage the five acres when not under the exclusive use of DPS in conjunction with the club's management of the entire range.

Motion: Melton moved and McLean seconded THAT THE COMMISSION VOTE TO APPROVE THE AGREEMENT WITH THE ARIZONA DEPARTMENT OF PUBLIC SAFETY FOR THE PURPOSE OF OPERATION AND MAINTENANCE OF A PORTION OF THE COMMISSION'S THREE POINT SHOOTING RANGE NEAR TUSCON, AND EXECUTE THE AGREEMENT AS ATTACHED OR AS RECOMMENDED OR APPROVED BY THE OFFICE OF THE ATTORNEY GENERAL OR BY THE BUREAU OF LAND MANAGEMENT.

Vote: Unanimous

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7. Request for Commission Approval of the Acquisition of Coal Mine Springs and Coal Mine Canyon, in Santa Cruz County, Arizona.

Presenter: Bob Broscheid, Habitat Branch Chief

MR. BROSCHEID: The Department was awarded an Acquisition Grant from the Forest Service for the purpose of 2,600 acres of private land. The Spring and Coal Mine Canyon acquisition will secure the Commission and the Department's management of the second largest population of endangered Gila topminnow and other non-listed species, such as longfin, dace and speckled dace.

Motion: Melton moved and McLean seconded THAT THE COMMISSION VOTE TO APPROVE THE ACQUISITION OF COAL MINE SPRINGS AND COAL MINE CANYON IN SANTA CRUZ COUNTY FOR RECOVERY OF THE ENDANGERED GILA TOPMINNOW AND TO PREPARE AND EXECUTE A PURCHASE AGREEMENT WITH THE TRUST FOR PUBLIC LAND.

CHAIRMAN CHILTON: If this is going to be managed by State Parks, what sort of situation are we looking at in terms of access for recreation.

MR. BROSCHEID: There will be foot access through the Sonoita Creek Natural Area that is very limited and it's foot access only; however, coming from the northeast corner will be legal access for the Department to access that property and conduct management activities. That was

negotiated in the purchase agreement, so that will be included.

COMMISSIONER MCLEAN: Is that just administrative access or is that public access. Public access to that road would be of high priority to me.

MR. BROSCHEID: That is for Department access. Whether public access will be allowed, I'm certain it will, but we're going to have to work with State Parks in addressing that issue. There might be potential for fire or other things, but during the development of the management plan, we'll be considering that in the process.

CHAIRMAN CHILTON: Is this subject to another management plan being drawn up? If this is going to be managed by State Parks, what sort of situation are we looking at in terms of access for recreation?

DIRECTOR SHROUFE: Although we don't have the agreement here right now, I'm sure it's addressed in there, but we'll make sure it's addressed. I knew that access was a Commission concern when we started this process and asked you for your okay to move along in the process, so we're going to have to look at that agreement, and I'm sure it's in there, but if it's not, it will be in there.

CHAIRMAN CHILTON: I suspect that maybe we should say even if we pass this, we need for you to look at it and make sure it is before you sign it.

Vote: Unanimous

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8. Statewide Shooting Range Briefing.

Presenter: Don Winslow, Education Branch Chief

MR. WINSLOW: I will be providing you an update of Department activities related to shooting ranges, support, and developments statewide. The update covers activities that have occurred since the August 2004 Commission meeting. The Commission may vote to take action on it or provide the Department direction on the items covered in the update. Let me provide you with some highlights from this particular update and I will be able to answer questions at the end.

One of the areas that we were looking at in Ben Avery was the use of the military to help us construct a hunter education range. We have discovered that the military is tied up right now, and there are no units that are available to assist us with that particular program, so we are proceeding and trying to develop that particular range, and going through a planning process with that.

We also bring to your attention to the grand opening for the public of the Pima County Range, which will be the 25th of September. That new range, although it's in operation right now, the grand opening we will officially have that particular range as part of the shooting ranges that are

throughout the state.

The National Wild Turkey Federation, actually the State Chapter, will be providing the agency with 2 \$5,000 for the Archery in the School Program. In addition, we'll be doing training in October for 30 or more teachers, bringing the number of teachers up to about 120 having gone through the program in Arizona. We will have an additional two trainings this year for that.

We also met during this period of time with the Mohave County Sportsmen, looking at the Kingman range and helping them in a planning process in continuing the operation of their club and organization.

9. Memorandum of Understanding with the Arizona State Rifle and Pistol Association.

Presenter: Marty Macurak, Assistant Director, Information and Education Division

MS. MACURAK: Before you is a Memorandum of Understanding (MOU) with the Arizona State Rifle and Pistol Association for the operation of the Ben Avery Range Fund. The Commission asked us to formalize our longstanding relationship with the Rifle and Pistol Association for operation of the range fund. The agreement addresses the desire of the Commission that the Department follow a best practices approach related to oversight of the vendor activities at the range. The Commission has had an opportunity to review the MOU. It includes provisions that the Commission requested; liability coverage, provisions for financial accounting, cash handling procedures, also regular dialogue with the Rifle Pistol Association and Department representatives to ensure that everyone is in agreement on those range fund related improvements. Also the Attorney General's Office has approved the proposal, so the Department is recommending that the Commission approve this MOU between the Department and the Arizona State Rifle and Pistol Association for operation of the Ben Avery Range fund.

Motion: Melton moved and McLean seconded THAT THE COMMISSION APPROVE THIS MOU BETWEEN THE DEPARTMENT AND THE ARIZONA STATE RIFLE AND PISTOL ASSOCIATION FOR OPERATION OF THE BEN AVERY RANGE FUND.

Vote: Unanimous

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Meeting recessed for a 5 minute break

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11. Request to Approve a Notice of Proposed Rulemaking for Article 9, Arizona Wildlife Conservation Fund Grants.

Presenter: Mark E. Naugle, Rules & Risk Manager

MR. NAUGLE: At the February 13, 2004 Commission meeting, the Commission approved a Notice of Docket opening to officially initiate rulemaking to establish the rules to prescribe procedures for the Arizona Wildlife Conservation Fund Grants Program. The Department held

public meetings in July at all the Department offices. The Department has drafted a rulemaking that incorporates the public comments and non-substantive style and grammar changes suggested by the Assistant Attorney General and the GRRC staff, and was provided to the Commission prior to this meeting.

The impacts of these six new rules are: R12-4901 - This rulemaking establishes definitions that assist the applicant in understanding the unique terms that are used throughout Article 9. R12-4902 - Establishes the general provisions under which eligible applicants may file an application and seek funding under the provisions of the Arizona Wildlife Conservation Fund. Under this section, the rulemaking addresses requirements that eligible applicants or participants must adhere to relative to a successful award, such as; the definition of eligible applicants, notification to applicants of funds availability, information on land tenure and control, information regarding reasonable public access, long-term operation and maintenance of the awarded projects, and the requirements of successful applicants to give public notice of the awarded funds. R12-4903 - This section prescribes guidelines for the Department to review proposals and to explain contingencies if an awarded project is due to some sort of substantive changes. R12-4904 - This section prescribes the processes and criteria that an applicant will follow, and what information the applicant will be required to include in the completed application forms. The applicant will be required to answer all questions that are relevant to the grant and application submittal process. Rule R12-4905 - This section prescribes the minimum terms and conditions to which participants have agreed to complete the awarded project. Significant requirements located in this section include, but are not limited to, a description of the general grant agreement, documenting the scope of work of the awarded project, a provision that allows the parties to amend the approved scope of work, a process for transferring grant funds to a participant, requirements governing equipment purchased with the grant funds, and the requirement the participant obtains current appraisals for land acquisitions. The Department intends to establish criteria in this rule which will allow the extension of a project. R12-4906 - This section will prescribe the requirement that a participant submit bi-annual project status reports to the Department. In addition, the participants will be required to obtain all books, accounts, and reports and files and other documents that relate to the acquisition of land and the performance of the contract.

If approved by the Commission, this notice of proposed rulemaking will be filed with the Secretary of State on September 24th, 2004. The Department will bring this package back to the Commission in December for final rulemaking. The anticipated effective date of these rules will be April, 2005.

Motion: Melton moved and McLean seconded THAT THE COMMISSION APPROVE A NOTICE OF PROPOSED RULEMAKING TO ESTABLISH ARTICLE 9, ARIZONA WILDLIFE CONSERVATION FUND GRANTS, AND TO PROMULGATE NEW RULES TO PRESCRIBE PROCEDURES FOR THE ARIZONA WILDLIFE CONSERVATION FUND GRANTS PROGRAM.

Vote: Unanimous

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12. Call to the Public.

MR. SMITH: There's no way I can hunt a checkerboard area without being cited for trespassing unless we have signs. There are sections of land with no signs on it, Arizona State land. There's three quarters of a mile to my right and a quarter mile to my left and then there's another section of state land that I could have legal access to, but we need signs.

JAY WESLEY SMITH: From the 2003 antelope hunt in Unit 18B, one of the officers took notes of our conversation. I've requested his notes from his boss, Mr. Posey in Region III and I still have no notes. He says it's not his obligation to give them to me, but I wanted to read the notes to you. The access problem in the State of Arizona is imminent. The Boquillas and all these access problems we're having; Spur Cross Ranch and Cave Creek. We've bought \$21,000,000 worth of property and there is no access. No hunting access, no users, no other user groups, just walkers and bird watchers. I think it's the Commission's job to look into this. Apparently there are two different laws in the State of Arizona; a criminal trespass and a hunting trespass law. I think the Commission should stand up for my rights when I buy a hunting license or get a permit. There's a 3% chance a drawing a hunting permit. Right now I would be almost 90 years old on my next antelope hunt. I feel the Commission should take care of these issues eminently, and officers like Mr. Tucker from Region III should be informed that maybe they should let the Sheriff or the State Department of Public Safety take care of criminal trespass.

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17. State and Federal Legislation.

Presenter: Anthony Guiles, Legislative Liaison.

MR. GUILLES: I'd like to give you a brief update regarding the primary election that was held on September 7th. In terms of the House and the Senate, it looks like things are probably going to take more of a swing to the right as they have been the previous two years. For instance, in the House there were six incumbents that lost in the primaries. Four of those were actually, the moderate Republicans from last year that voted with the Democrats to help us on the budget. So we may have a longer road to haul this budget session. I just want to make you aware of that as we head into the legislative season.

COMMISSIONER GOLIGHTLY: I'd like a little briefing to keep us up to date, like what you just told us about the primary. We all live in our own separate little counties, and some of those races aren't in our own counties, so it would be helpful to know that a moderate was replaced with a conservative moderate.

COMMISSIONER MCLEAN: Sometimes you just need to let us know what some of these new faces are because some of us have some relationship, friendships, and so forth with some of those folks and if you are viewing those as new fences then we need to start working them early.

MR. GUILLES: I'd be happy to get those new faces out to you, and if you have any connections,

we'd be more than happy to try to bridge that gap. I'd also like to point out, from the direction you gave me last August in terms of legislation, what the Department's been working on the past month or so. Those were immunity, wildlife feeding, the civil process enhancement, and also looking at the watercraft fees in regards to the Lower Colorado River Multi-species Conservation Plan. We'll be bringing you, hopefully, the language for these four bills and any others that you may so direct the Department after the afternoon session today.

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18. Request from Mr. Don Martin Regarding His 2004 Hunt Permit-Tag for Hunt Unit 12B West.

Presenter: Steve K. Ferrell, Deputy Director

MR. FERRELL: At the August Commission meeting in Flagstaff, Mr. Martin approached the Commission and mentioned in his testimony on the options to the 10 percent cap that he wished to surrender his 12B West late tag to the Commission in exchange for the reinstatement of his bonus points. On August 18th he sent a memo addressed to the Department making that request formal. Essentially, what he is asking for is for the Commission to reinstate his bonus points in exchange for his tag. The purpose of his intent is because he felt that the quality of his hunt has been diminished now that we've added 22 tags to that unit in response to the Montoya decision. He is asking that the Commission, in return for him surrendering his tag to the Department, have his bonus points reinstated and that he be given an additional bonus point for this year as though he had not been drawn. Then he adds in that letter, which you all have copies of, he says he would also like to have tag funds returned although he understands that may not be possible under the current rules. That is in fact the case, Statute doesn't allow us to provide refunds once licenses and tags are issued.

COMMISSIONER GOLIGHTLY: We have 80 percent of Unit 10 that we've already issued tags for and we didn't know as of Wednesday if we were even going to be able to access Unit 10. So let's say that we had all those tags in Unit 10 and all of a sudden our hunters couldn't participate in any hunting on 80 percent of Unit 10. Are we going to give everyone's bonus points back to them because all of a sudden everyone's compressed into 20 percent of the unit? What does the Department recommend? If we set a precedent now of somebody thinking something isn't right about their hunt, are we going to this type of business?

MR. FERRELL: There hasn't been a precedence yet established for people wanting their bonus points returned in exchange for their issued tag based on quality of hunt issues. The only time this precedence of returning bonus points has ever been done in my memory was under the 9/11 response when the Commission did return bonus points for people in the military and public safety personnel who got engaged in the response to the tragedy in New York City and Washington DC. In response to that, we wrote a rule that permitted members of the military who were being deployed and public safety personnel that were in a response to a national emergency might get bonus points returned to them by rule. But certainly those were different circumstances than what we're talking about here.

COMMISSIONER GOLIGHTLY: I know that deer south of the Colorado River aren't bonus point conduits, but in the Klondike area, there are some road closures to access to thousands of acres of public land. You never know from one day almost right up to deer season whether you're going to be able to access Deer Creek or some of those areas. I just worry about getting into this type of business when it's a nonmilitary issue. It's a non-emergency.

COMMISSIONER MCLEAN: If we get into this business, anything beyond that scope which is already provided for by rule, we are going to then be in the business of evaluating the quality of everybody's hunt and trying to measure that against an immeasurable yardstick. I think every deer hunt in Arizona is of a quality that if I got a deer tag issued this year, I'd be on it no matter where it was, and no matter how many other hunters there were.

COMMISSIONER MELTON: I'm of the same feeling as the rest of the Commission.

CHAIRMAN CHILTON: Lots of things can impact your hunt all the way from drought, to a fire, to some accident on the road. There are lots of things that can impact one's hunt, so I don't believe that we can fix this problem and I believe he truly understands that it was our only possible response to the mandate of the Court.

Motion: Golightly moved and McLean seconded THAT THE COMMISSION NOT GRANT MR. DON MARTIN THE REQUEST FOR A RETURN OF HIS HUNTING TAG AND TO HAVE HIS BONUS POINTS REINSTATED.

Vote: Unanimous

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21. 2004 Annual Commission Awards Selection.

Presenter: Dana Yost, Executive Staff Assistant

The Department provided to the Commission prior to this meeting an overview of the 2004 Commission award nominees and asked the Commission to vote to select the 2004 Commission award recipients. The Department also asked the Commission to consider (effective with the 2005 awards cycle) eliminating the Media of the Year Award category and in its place instituting an Educator of the Year Award.

MR. YOST: What we have before you is the nominees for this year's Commission awards to be presented in January at the "Meet the Commission" award banquet, and divided up by categories. The matrix allows you just to go down through the list and basically make your selections. You have been provided with the background information on each of these individuals. I'll be available to answer any questions that you might have on any one or any of these issues.

COMMISSIONER MELTON: Bob Kreycik and Clancy Gansberg, DVM, those people been on every sheep transplant that I'm aware of since they retired. That is a very prestigious group of volunteers that take care of our sheep. The other ones are, Catron County, Graham County,

Greenlee County, Navajo County, and Sierra County, San Carlos and White Apache tribe. In dealing with the wolf, the Mexican Wolf, all those people finally got together and got on the table, and they're going to town, and I think they need a little pat on the back for becoming involved. That's my two nominations in that area.

Motion: Melton moved and McLean seconded THAT THE COMMISSION NOMINATE CATRON COUNTY AND BOB KREYCIK, DOCTOR OF VETERINARY MEDICINE, AND THAT GROUP OF PARTICIPANTS THAT ARE LISTED IN THOSE TWO CATEGORIES BOTH FOR THE AWARD OF EXCELLENCE.

Vote: Unanimous

COMMISSIONER GOLIGHTLY: In addition I'd like to add Ted Cordory and Timothy Jones. Mr. Jones is deceased now, but he donated \$3,000 to Wildlife for Tomorrow for the Apache Tribe recovery. So that would be my two.

Motion: Golightly moved and Melton seconded THAT TED CORDERY AND TIMOTHY CARTER JONES, DECEASED, BE ADDED TO THE AWARD OF EXCELLENCE.

Vote: Unanimous

CHAIRMAN CHILTON: Just for public information, we generally have one person, but sometimes we think there's more than that. For youth environmentalist, we have a young woman and a young man, Alex Shepers and Jon Watson.

Motion: Melton moved and Golightly seconded THAT THE COMMISSION NOMINATE ALEX SHEPERS AND JON WATSON.

Vote: Unanimous

CHAIRMAN CHILTON: We have Alex Shepers and Jon Watson for youth environmentalist of the year.

Motion: Melton moved and Golightly seconded THAT THE COMMISSION NOMINATE LEE ALLEN FOR OUTDOOR WRITER OF THE YEAR.

Vote: Unanimous

Motion: Golightly moved and Melton seconded THAT THE COMMISSION NOMINATE OUTDOORS ARIZONA FOR MEDIA OF THE YEAR.

Vote: Unanimous

Motion: Melton moved and Chilton seconded THAT THE COMMISSION NOMINATE THE ARIZONA ELK SOCIETY FOR CONSERVATION ORGANIZATION OF THE YEAR.

Vote: Unanimous

COMMISSIONER GOLIGHTLY: I would like to nominate Reese Bostwick as conservationist of the year. He has continued to advocate for Game and Fish and prosecutions of many violations of Game and Fish Statutes. But I would kind of like to have Nicoson get involved in that. She's the one running the Elk Society and has done tremendous in three years of that organization.

Motion: Golightly moved and McLean seconded THAT THE COMMISSION NOMINATE REESE BOSTWICK FOR CONSERVATIONIST OF THE YEAR.

Vote: Unanimous

Motion: Melton moved and Chilton seconded THAT THE COMMISSION NOMINATE COOKIE NICOSON FOR CONSERVATIONIST OF THE YEAR.

CHAIRMAN CHILTON: I would like to consider Rene Dube in addition. He's done a lot of work with the Wild Turkey Federation.

Vote: Aye - Melton and Chilton
Nay - Golightly and McLean
Motion did not pass

CHAIRMAN CHILTON: Nonetheless, thanks to Cookie anyway.

COMMISSIONER GOLIGHTLY: Did you nominate Rene Dube?

CHAIRMAN CHILTON: I did not hear a second to my suggestion.

CHAIRMAN CHILTON: Environmentalist of the year. Do I hear a recommendation?

Motion: Melton moved and Golightly seconded THAT THE COMMISSION NOMINATE RANDY LAMB FOR ENVIRONMENTALIST OF THE YEAR.

Vote: Unanimous

CHAIRMAN CHILTON: Volunteer of the year. Do I have a person that would like to make a nomination?

Motion: Golightly moved and Melton seconded THAT PHILLIP AND LORI SMITH BE NOMINATED FOR VOLUNTEER OF THE YEAR.

Vote: Unanimous

Motion: Chilton moved and Melton seconded THAT PAUL HUMPHRIES BE NOMINATED FOR WILDLIFE HABITAT STEWARDSHIP AWARD.

CHAIRMAN CHILTON: That nomination was submitted by the Landowner Lessee Sportsman's Relations Committee and they did so after hearing comments of different sports representatives on that committee who said that this individual had been quite helpful.

Vote: Unanimous

MR. YOST: There is one additional part to this agenda item. There's a recommendation that came actually from Marty Macurak, our assistant director for information and education. It was put forward as a bright idea, and it went through our executive staff process, and that was for the Commission to consider replacing the media of the year award with an educator of the year award. The media of the year award creates sort of a competitive issue with media outlets and perhaps the appearance of favoritism, and she thought that perhaps that would not be the best thing for the Commission to do. Rather than a media outlet of the year, it could be based on a feature story or a feature article or something like that. We're ten months away from putting this out, so if you can make a decision on that today or you could consider it and we can bring this back at a future date.

COMMISSIONER MCLEAN: I think adding an educator is an excellent idea, but I don't know why it has to be in lieu of somebody else on the list?

MR. YOST: The awards evening does get a little bit long with the number of awards and I think we're probably at about 14 or 15 with the number you selected. That would be the only consideration that you would make.

MS. MACURAK: I guess the quick answer to you is Dana's answer. Also, after having had a discussion with representatives from Arizona Bowhunters and their magazine, an alternate consideration for the Commission might be, rather than eliminating media of the year because I know it's important to you to recognize media that is associated with sportsmen's groups, but perhaps I could offer a suggestion of instituting changing media of the year to feature coverage of the year. Our concern with media of the year, is that we had some of the large commercial media organizations nominate themselves for awards when in fact their coverage wasn't any more substantive or frequent than other media organizations, and it put us in a position of choosing Channel 1 over Channel 2. In very competitive markets like Phoenix and Tuscon, we thought that that really wasn't to the Commission's or the Department's best advantage to acknowledge a particular media. Perhaps if we substitute feature coverage of the year, then that doesn't preclude a large organization from winning, but also gives us ample opportunity to recognize some of the sportsmen's publications.

COMMISSIONER GOLIGHTLY: That's the negative part of it, but the positive part of it is that, for instance, the selection this year was Outdoors Arizona. They've dedicated a lot of time in the field and on the radio waves, and they need to be recognized. In the past, the Commission has made some mistakes with choosing media of the year and it backfired on us where we paid dearly. An event like that has turned on us, so I would recommend adding someone's feature. I think if someone spends six months researching and puts out just a tremendous article, they should be recognized. If we cut the scripts down we could have one more. If you see a value in

that, we would take your advice and I don't think in the past we have not awarded a Media of the Year and you don't have to award anything if we don't get the right selection. Channel 2, Channel 3, if we see that competition as detrimental to the Commission, we won't award either one of them. I recommend that we add Marty's recommendation and if it doesn't work we can always eliminate it or not vote for a winner.

COMMISSIONER MCLEAN: What's the label you're going to suggest?

MS. MACURAK: We like educator of the year and it was our belief that that could apply just as well to an organization that served the Commission, the Department, and the sport by educating the public or an individual. So we thought that that label offered a fair amount of flexibility, and I think Commissioner Golightly's suggestion is a good suggestion.

CHAIRMAN CHILTON: I don't think educator and media will be interpreted as the same thing, even though the media certainly educates at times; however, primarily educator is seen as teacher and since we do have programs for classroom teachers, and we do have a role for them, maybe it would be appropriate to have them be on the list. I agree with something Mike just said and that is we can eliminate some of the trivia from the descriptions. We can just do a paragraph that summarizes what their function was related to the award.

MS. MACURAK: So perhaps a possibility for the Commission might be to add a category of educator of the year to recognize public education efforts, and then the alternate I guess would be to replace media of the year with feature coverage of the year, which I don't believe would preclude Outdoors Arizona; or, to add two categories and perhaps not award one.

COMMISSIONER GOLIGHTLY: I didn't say replace media of the year. I think we need to retain that.

CHAIRMAN CHILTON: She said instead of calling it media, focus on what they did, which is the feature.

COMMISSIONER GOLIGHTLY: And I don't accept it. What I thought I said for the Commission was, don't do anything to our current program, but add a new category that you're going to recommend as educator of the year?

MS. MACURAK: Educator of the year and/or feature coverage of the year. You could add two categories.

COMMISSIONER GOLIGHTLY: I think media of the year is important.

COMMISSIONER MCLEAN: I see this feature of the year being substantially different than the media of the year. I'm agreeing with Commissioner Golightly and I don't know if we ought to have both every year, but maybe we ought to have the opportunity for both every year. But I absolutely think we need an educator of the year because there are some people out there doing some things in our schools that are really turning some of these kids on, and we need to do everything we can to continue that and to award that.

Motion: McLean moved and Golightly seconded THAT THE COMMISSION ADD A CATEGORY TO RECOGNIZE AN EDUCATOR OF THE YEAR.

Vote: Unanimous

CHAIRMAN CHILTON: About the media then, we'll just leave it as the same.

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22. Director's and Chairman's Reports.

CHAIRMAN CHILTON: I've been answering phone calls and reading documents and all these nicely prepared staff reports that people are sending me.

DIRECTOR SHROUFE: I took two weeks of annual leave and the other two weeks I spent my time basically on some current issues such as the Boquillas access issue. That's taken a lot of my time, and then just going to individual meetings. I do want to report that went to the signing ceremony that was with the Department of Water Resources, and Secretary Norton was there and the Commissioner for Reclamation, John Keys. Arizona, California, and Nevada did sign the Lower Colorado Multispecies Document, so that's been ongoing since 1997. Several million dollars have gone into that effort. The Arizona Game and Fish Department has played a large role in that in adding the technical expertise for the species, along with the water issues and the power issues that were addressed. As a result of that there is a \$6,000,000 program that will start up as the result of that document being signed. That is to ensure that the conservation of species, the delivery of water and power are coordinated and remain optimal. So as part of that and part of our discussion before, the Arizona Game and Fish Commission and Department will be looked at for approximately \$160,000 of that per year, and we've discussed that in the previous legislative items, of increasing the Colorado River use stamp and nonresident boat registration. So I don't know where that's going to go; if the Commission's going to approve that. The whole funding issue seems to still be being discussed. In the meantime, regardless of whether it's a water surcharge or the Commission does something to pony up into this trust fund or the power users put another tax on, it's going to take several years for that money to start rolling in. CWC, the old cap program, has guaranteed that they will foot the total Arizona bill until those other streams of revenues start coming into the trust funds. We still have two to four years to work on that.

23. Commissioners' Reports.

COMMISSIONER MCLEAN: I spent a whole lot of time reading a whole lot of documents and reading an incredible number of emails and memos that were sent to me both by the Department and I think every hunter in the State of Arizona. I tried to read every one of them and I'm not sure I succeeded. In addition to that, earlier this week, I had the absolute pleasure to represent the Commission earlier this week at Mountain View Elementary School down in North Central Phoenix for the presentation of a symbolic ten millionth dollar Heritage Fund Check Award. This is a school that got one of our, if not the very first, Heritage Grant to build a habitat garden

on their elementary school grounds, I met one of the most fantastic teachers that I have ever met in a program. That is one of the most fantastic programs that takes kids in the inner-city and introduces them to the relationship between wildlife habitat and wildlife. These were about 60 kids who, because where they live and who they are, probably had no idea to see any wildlife any more significant than pigeons. They've taken the back 40 of this school, and hauled in dirt and granite and cacti and mesquite trees and Palo Verde trees, and created an area where these kids go for their reading classes and they watch wildlife. Kids were talking about wildlife and about wildlife habitat that would otherwise have no idea what those words meant.

COMMISSIONER MELTON: I was involved with some meetings with Southwest Arizona Habitat Partnership Committee, and they set up with one of the local farmers down in Yuma, a private hunt area where they actually brought some out-of-state people in to pay to hunt to raise funds for the group, and to set aside some more habitat to create some funding, and it worked out very well. We had a very good bunch of volunteers down there. The first three seasons of dove season they charged them so much and everybody that hunted was completely tickled to death. We had a lot birds this year. I also worked with the Yuma Valley Rod and Gun Club on a number of issues; some of their board meetings, specifically with BLM. We had a meeting this previous Wednesday night in Yuma with BLM on the new plans they're drawing for their management plans and monuments and stuff. It was a very successful meeting and a lot of the good information was communicated regarding the problems that we're having.

COMMISSIONER GOLIGHTLY: I had numerous calls on the Big Boquillas issue. I had quite a bit of work to do on the shooting range mediation process in Flagstaff including issues with the 10 percent cap. I also received bulk mail on that issue, and phone calls. I helped extend the ten millionth dollar. We had the Heritage celebration and issued the check in Flagstaff at the Willow Bend Environmental Center, and it was quite a media event and political gathering; very poplar.

24. Approval of Minutes

DIRECTOR SHROUFE: Due to the change in minute takers, there are no minutes for approval at this time. For signing of minutes, we have June 9, 2004, and June 18th and 19th of 2004.

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1. Executive Session (Continued)

Motion: Golightly moved and Melton seconded THAT THE COMMISSION GO INTO EXECUTIVE SESSION.

Vote: Unanimous

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Meeting recessed 11:40 a.m.

Meeting reconvened at 1:30 p.m.

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13. Hearings on License Revocations for Violation of Game and Fish Codes and Civil Assessments for the Illegal Taking and/or Possession of Wildlife.

Presenter: Leonard Ordway, Law Enforcement Branch Chief.

Record of these proceedings is maintained in a separate minutes book in the Director's Office.

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10. Conservation of the Cactus Ferruginous Pygmy-Owl.

Presenter: Jim deVos, Research Branch Chief

MR. deVOS: The Commission requested an evaluation of the ongoing conservation practices for the cactus ferruginous pygmy-owl in Arizona. In the event that one of the Commissioners ask a question that I would be unable to answer from a technical standpoint, we have three of the Department's pygmy-owl team, Dennis Bote, Robert McGill, and Gerry Perry. Some of the things that we're going to cover are both the legal and the biological elements of the cactus ferruginous pygmy-owls in Arizona. One of the things that makes working with pygmy-owls somewhat difficult is that there is little data in existence on the owl. One of the things that we have been working on and you'll see in the slide presentation is the population, size and distribution. One of the limitations is that there have not been a tremendous number of rigorously conducted surveys in Arizona. There are anecdotal records of the bird occurring in many places where they don't appear to be today, but the overall number of samples is small. We're working to try and document age and sex structure of the birds in Arizona; survival and reproductive rates by age and class; and understanding the genetics and the genetic relationships between those birds that are found in Arizona and those birds that are found elsewhere, including Mexico and into Texas. We're trying to understand dispersal capabilities, and part of that is to look at interchange between Arizona and Sonora; distribution and quality of habitat. As we develop a greater understanding of where the birds are found and what types of habitat they rely upon, it will help guide conservation efforts on those areas that have optimal potential for success. Finally, we want to look at the role that environmental and demographics play; there's been some substantial human caused changes in pygmy-owl habitat in parts of Arizona.

Regarding the legal aspects related to the bird, in March of 1997, it was listed as an endangered distinct population segment where the Arizona portion was listed. Critical habitat was not designated and invariability plays in some of trends that we've observed. In response to a Court order, critical habitat was designated in four counties, mostly in central and southern Arizona. In September of 2001, there was a Court challenge to the listing of critical habitat designation, and the Court upheld the endangered status, but asked the Fish and Wildlife to review the critical habitat designation. In November of 2002, the Fish and Wildlife Service proposed a rule to re-designate critical habitat for those two counties, Pinal and Pima County, so two of the other counties were dropped. August of 2003, in response to a plaintiff's appeal on the listing of the pygmy-owl as a distinct population segment, the Ninth Circuit Court of Appeals found that the Fish and Wildlife Service did find the discrete population to be significant. Then in June 2004, the Arizona District Court's ruling reversed the previous one, and asked the Service to do a

status review that's due in 2005. Since this ruling, the plaintiffs have requested the bird to be delisted until the status report is complete and ruled upon, and a decision on that request is pending at this time.

The folks that are working on the ferruginous cactus pygmy-owl are quite diverse. Basically, the recovery program is comprised of two different groups, a technical subgroup that includes a representative from the Arizona Game and Fish Department, federal agencies, Tribal Nations, and someone from the academic environment. The implementation group is larger and represents, again, federal and state agencies, Tribal Nations, and it also expands to include the municipalities, ranching community, mining interests, and conservation organizations. So the goal is to try to utilize a fairly broad based set of opinions and values to help value conservation. We've been doing research within the Department for a number of years and there are other researchers that have been working longer than that. Some of the key things that we've learned involve these seven issues: the distribution, demography, diet, habitat selection, home range, dispersal patterns, and genetics. We've done a fair amount of work in cooperation with the Arizona National Guard. Because of some of their regulatory requirements they've asked us to participate in searches of some of their areas. The biggest limitation in the data is the fact that we have few birds to work with. Some species we have a lot of them and we sub-sample and make inference from statistical tests with pygmy-owls, but we feel that we're finding the majority of them that are out there. The fact is that the trend for the last six years has been that fewer birds and fewer active nests are found, that the total number of fledglings, or young birds, that eventually leap from the nest, and the number of active nests per linear area are all in decline. We've been looking at diet. We have two nest in an urban area, and two nests in a non urban area. Using remote video cameras we see birds coming in and dropping off prey items. In both environments, lizards are the most common. In the non urban, mammals are important. In the urban area, birds are important. So it's a fairly similar trend in the fact that lizards are most important, but there are some small differences between the diets of the birds. In general terms, where these guys live, all of the active locations that we found in the last several years have been below 4,000 feet in elevation. Typically they have large columnar cacti or a tree with trunk diameter greater than 6 inches suitable for nesting. Pygmy-owls utilize cavities formed by other birds, typically woodpeckers. They don't make their own nest, so they're tied into these features probably for a thermal factor. It's cooler in the cactus and it allows them to persist in a warm environment. They live in multilayered vegetation providing cover, foraging, and perching substrates. The upper canopy and vegetation configure to allow them to move and disperse. Finally, the habitat elements configured to allow unimpeded use of movement. In urban areas, the birds are not long range movers. Some of the questions revolving around pygmy-owls focus on which subspecies occurs where. Birds that occur in Arizona and in the northern portion of Sonora, Mexico are genetically very similar suggesting that there is not a taxonomic break at the international boundary.

The important conservation strategies include dedicated effort to work on the habitat conversation plans. Those are plans that are put together that focus on proactive approaches to dealing with sensitive elements, and brings partners to the table to focus on broad issues. We believe it's also important to participate on implementation and recovery teams. The implementation team coupled with the technical team, constitute the recovery team. It's important to expand efforts to document the status and distribution in Mexico. There was some

work done about five years ago where they were looking at the numbers in distribution of the birds in Mexico. What they found there is that the bird is more abundant than it is in Arizona. One of the problems is it was done as a master's thesis work, and like all starving students, there wasn't enough time or money to look at all of the areas. What they found is that the bird could probably be described as locally abundant, but there were patches. What we don't know is what's occurring in some of these interstitial areas, and I think it's an important element that we start to look forward to doing some work in Mexico. I also want to continue to provide the Fish and Wildlife Service with new information from Arizona as it's generated.

After reviewing all of the background that we prepared for this presentation, the Department reaffirms its previous recommendation that neither listing nor designation of critical habitat is warranted in Arizona, but we also believe that the Arizona population is not discrete, and that the population at least in Sonora, Mexico is larger in size. Any effort that's based solely in Arizona will not provide significant benefit to the species. Using the approaches that we are currently using, we think prudent actions include, initiating research in Mexico to document the distribution and abundance in the states of Sonora and Sinaloa; continue the current genetic studies; continue to work with the Forest Service to evaluate recovery strategies such as population augmentation; and continue to develop and implement habitat conservation planning efforts.

Motion: Melton moved and Gilstrap seconded THAT THE COMMISSION REAFFIRM IT'S PREVIOUS RECOMMENDATION THAT NEITHER LISTING NOR DESIGNATION OF CRITICAL HABITAT OF CACTUS FERRUGINOUS PYGMY-OWL IS WARRANTED IN ARIZONA.

CHAIRMAN CHILTON: I presume this is to be sent on to the Fish and Wildlife Service and to continue our collaboration with them in the effort to build the information base that we have and to do what we can to further the research.

COMMISSIONER MELTON: You were talking about augmentation, is there difficulty in raising these little owls? Can we do some kind of captive breeding process with them?

MR. deVOS: They do quite nicely in captivity and are very productive.

Vote: Unanimous

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14. Online Internet Application Process.

Presenter: Steve K. Ferrell, Deputy Director

14.a. A Briefing on Options to Modify or Eliminate the Online Internet Application Process.

MR. FERRELL: I should point out to you that we have a guest in the audience today that has flown in here from Salt Lake City, and her name is Deborah Morris. She is the regional manager

for Wells Fargo Bank out of Salt Lake City, and her specialty is the transaction agreement services. We asked her to come here in case the Commission had any questions about the Internet issue and the use of credit cards and debit cards and electronic funds transfers and things of that nature. She needs to leave at about 4:30, so if at any point you want to hear what she might have to say, or ask her any questions about charging up front for tag fees through the draw on the credit card, she's here to answer those questions.

DEBORAH MORRIS: I handle merchant services for large accounts and I've been asked to come here to answer questions that you have regarding online payments for draws that you have. I do know that there's been some questions as to whether you can charge the individual the complete draw and associations up front, and then give them a refund later. The associations are really strongly against this. The reason is that they have stipulated in their regulations and you would be in violation of those regulations if you were to charge them something for nothing. So if you charge them for the \$5 application fee, you're fine. If you charge them for the whole entire draw, so they wanted to do elk, and then they didn't get the elk and you had to refund it, they did not receive that service. So then you would have to refund them not just the \$5, but the entire amount. Okay, so in other words, since they didn't receive the service, then you cannot charge them up front for the entire amount. There was a question about maybe using debit cards instead to do this? Using a debit card on the Internet as it stands at this time is no different than a credit card on the Internet. The difference between that is with a debit card, you put in your pin number, you hold the liability. If you give that pin number to your child or to your spouse, shame on you if they use it. If you're on the Internet, there is no security at this time to cover that. That's the difference between treating a debit card on the Internet versus a credit card.

COMMISSIONER GOLIGHTLY: If each species were on its own playing field, and the \$5 application fee were tied to elk, and we hold a draw for elk, and then a \$5 application fee for antelope, and it becomes the next species that you put in for, I realize that you're getting a product for each one of those, aren't you?

MS. MORRIS: Yes, you are. You're paying for the application to actually participate in the draw.

COMMISSIONER GOLIGHTLY: Well, what if the fee were included in the price of the tag?

MS. MORRIS: But they're not getting that draw.

COMMISSIONER GOLIGHTLY: Is the real factor behind this the fact that you have to refund someone's money?

MS. MORRIS: It's not just that. When they want you to treat that money and credit cards all the same, and one of the regulations is that money has got to move through, and so when you're giving somebody a credit line, you're hitting their credit. They're paying interest on it. They're paying fees on it, just as the merchant is. So between the merchant's fees and the card holder's fees and then you don't have a product, then you've got problems. So you have to give them a product. The only time that there would be something different would be like a hotel where they charge you for the first night up front before you even show up. That's been stipulated. There's

another one where if you're doing a specialty product, somebody is going to buy something that they're going to manufacture for you, and it's only custom made for you, then you can pay up to 50 percent of that; otherwise, they have to charge you the amount of the purchase and then you get that product within 48 hours.

COMMISSIONER MELTON: How would you suggest that we set up a system that we take their license fees first, at the time they apply, and if they do get drawn, what kind of mechanism could we then use to have them pay for that tag fee?

MS. MORRIS: At that time I would suggest notifying them. I understand that you communicate with them a lot via Internet notification. Charge them for their license, that's a service that their getting because they can use it right then. If they get drawn, then send them an email that they have won the draw and need to come up with the monies. At that time they either give you the credit card again or I send you a check, or whatever.

COMMISSIONER GILSTRAP (now present via telephone): You apply for a permit, a hunt permit, and you're charged \$100 for that permit, and everyone that applies is charged \$100, and they all receive a permit to hunt elk in Arizona. At a future date, the Game and Fish Department goes through their evaluation process and validates X number of those hunt permits, and those that are validated go ahead and hunt, those that aren't validated receive a reimbursement for the exact amount that they applied, the \$100.

MS. MORRIS: I think you're on a really gray, gray line here, because you're not giving anything up front. It would be different if you didn't know, but you know up front, straight forward that the majority of those individuals will not be receiving that tag.

COMMISSIONER GILSTRAP: And they do, too.

MS. MORRIS: They do, too, but they don't want to pay it either up front, do they? They want their service, what they pay for.

COMMISSIONER GILSTRAP: You might ask some of those in the audience if they want to pay up front.

COMMISSIONER GOLIGHTLY: The real issue here is who makes the rules? Are you making the rules? Is it a federal rule?

MS. MORRIS: No, there is no federal law. Visa and MasterCard have rules. It's just like when you go to play bingo. There are rules to playing bingo. There are rules to playing with MasterCard and Visa. You're talking financial institutions here that are moving the money around the world. When you start messing with that, you can class action suits coming upon you. The only trouble that you have with this is that everything is driven by the card holder. The card holder holds the key. If you want to push something through, or you need something done, a card holder has to do it. If you want to charge a card holder \$100 for something that he's not going to get, he can go back to his bank, he can say, I did not get this service, and I'm not going to get this service, they give him back his money and charge you \$30.

COMMISSIONER GOLIGHTLY: But can't he disclaim that? Can't he check a box that says I understand I may not get a dime back or I may not get any service at all? You need to come up with something because if you want our money, you're going to need to find some way to take it. If you don't, we'll find some other way to do business, and it won't be with your bank.

MS. MORRIS: You know what, I totally agree with you. It's not me, it's not the bank, it's the associations, so I strongly suggest you writing some letters and sending some stuff off to them, saying, we've got this issue. If you don't go to them, nothing is going to change, and they are slow, slow. They're big, they're huge, and you know how that moves. So the more that you get people involved, and the more they see this situation coming up and this desire to do this, then they may look at situations. Right now when I went to them personally and asked about it, I got laughed at and told, because of the monies that were moving around and the control that we were losing and the service that we're not giving at that time, that I was being silly to even ask.

COMMISSIONER GILSTRAP: One of the things that's unique in this situation, is the people that apply know at the front end that they may or may not receive a product. They are okay with that. They would be okay with that charge on their card to be reimbursed later. That's one of the differences in the mentality of the person in this situation as opposed to a person who walks into a store or orders online.

MS. MORRIS: Okay, the difference there would be that the associations know that you're locking up that money, know that the cardholder is paying money on it, know that you're paying money on it. Knowing that everything is not moving like it's supposed to without a service. If the cardholder willingly and knowingly went ahead on the Internet, checked the box, said, I know up front I may not get this, if they wanted to they could go after you. The merchant holds the liability. It's the rules. It's the regulations for processing credit cards with MasterCard and Visa.

MR. FERRELL: Just one last point. We also asked the same question of our Arizona Department of Administration and the State Controller of the General Accounting Office who wrote back with a response dated September 10th, and just to give you some of the highlights there, it's pretty much the same story we've heard all along. Things like, the merchant shall not process Sales prior to delivery of the product or the service, and actual charging for the transaction is not permitted until the delivery of the product or service, but what I wanted to bring your attention is that they said to please keep in mind that since the State is one legal entity, the Department's actions could impact the card operations of other state agencies.

Public Comment

BRIAN DOLAN: I filled out that form because I didn't know what action you were going to take. We live in the United States. This isn't Russia. I have enough faith in our free enterprise system that we're going to be able to figure out how to get through the difficulties of a credit card charge. There's countless examples. Two weeks ago I reserved an airplane ticket, I still don't have that ticket. That flight's in December, and I can be bounced from that flight just as easy as I can not be getting a pink slip for an elk tag, so I got to believe that there's enough

latitude in our free enterprise system, and it's just a matter of finding a vendor that wants to be doing business with you. I just got to believe that there's a way to figure it out. But if we can't figure it out, I think we need to do away with the Internet application process.

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15. Options for Maintaining Resident Hunting Opportunity in Light of the July 13, 2004, U.S. District Court Order in the Matter of *Montoya v. Manning*, CIV98-0239 PHX RCB.

Presenter: Steve K. Ferrell, Deputy Director

15.a. Notice of Proposed Rulemaking to 1) Create a Loyalty Bonus Point; and 2) Increase the Bonus Point Pass Percentage of the Big Game Draw from 10% to 20%.

MR. FERRELL: At some point before I get into the individual agenda, and it might be beneficial to the Commission to let Jim Odenkirk come up here and give you that short legal synopsis that Commissioner Melton had asked for earlier in the day. But before Jim does that, I'd just like to say that the packet that's in front of you represents work by quite a few Department employees and I'd be remiss if I didn't at least acknowledge them. That team was led primarily by Dana Yost, and Dana got significant contributions from Linda Melker, Brian Wakeling, Mark Naugle, Carlos Ramirez, Tom Gadden, and Richard Rico. I also need to mention to you that because this was such a large product, we're really not in a position to finish this today. What we can do is share with you the context or the substance of what our proposals are and our recommendations, but because the compressed timeframe, the attorneys haven't yet completed their thorough legal analysis of the actual language. We would need to let them complete that this weekend and get you the final draft language on Monday or Tuesday and maybe do a telephonic Commission meeting on Friday in order to have you vote on the final proposed language. With that, I'd ask Jim Odenkirk to give you that legal synopsis.

MR. ODENKIRK: Let me go back a little and refresh your memory on how we got to where we are today. The decision from Judge Broomfield set out an analysis as to the way the Commission needs to approach regulating nonresidents in the future. We start from the premise that the Ninth Circuit identified that Arizona has a legitimate interest in maintaining recreational hunting opportunities for its residents, but attempted to achieve that result by discriminating against nonresidents. The test that is set out is that the State can only impose restrictions on nonresidents that are necessary to maintain resident hunting opportunity and that are of the least restrictive alternatives available. That is where Judge Broomfield found fault with our 10 percent cap. What the Commission had done through its regulations was impose a 10 percent cap on nonresidents without having first determined whether or not the 10 percent cap was necessary to maintain resident opportunity and without showing first that it's the least restrictive alternative available. Instead, we imposed a 10 percent cap and tried to demonstrate that it was necessary to maintain resident opportunity, which was a difficult burden to meet. In light of the judge's decision, the ability to continue to discriminate against nonresidents is not available. The Court has found that that is unconstitutional until the Commission can first establish reasonably what level of opportunity it's trying to maintain, and then to show what impact nonresident hunters are having on the ability to maintain that resident opportunity. Until the Department and

the Commission can identify that impact, the only alternatives you have at this point are to rely upon nondiscriminatory, or evenhanded measures as an attempt to maintain resident opportunity, and if you find that those measures are inadequate to maintain resident opportunity, you may then look at other alternatives, perhaps even discriminatory alternatives if necessary to achieve your legitimate interest. Now this all assumes that recreational hunting substantially impacts commerce. If at some point in the future that issue is reevaluated by the Courts, and it is determined that recreational hunting does not impact, substantially impact commerce, then we can reconsider the issue of imposing further restrictions on nonresidents.

There are some proposals that the Commission has been presented with that will involve further regulation of nonresidents. There's also an issue before the Commission concerning the existing regulation for bighorn sheep and buffalo. As you're aware, the Court's decision only affected the regulation of nonresidents as it applies to bull elk and deer north of the Colorado River. Of course the decision did not directly affect the regulation as it applies to bighorn sheep and buffalo. So you're faced with a decision as to whether or not you continue to enforce that regulation in light of Judge Broomfield's decision, or you determine that it is also unconstitutional and direct the Department not to enforce that regulation any further. With that decision before you, there's a question of liability that if you decide to continue to enforce the regulation. What you found with the decision with Judge Broomfield is that he issued an injunction against the enforcement of that regulation, but he has not imposed damages against the State of Arizona. In fact, the damage claim was dismissed in that litigation. But if you decide to continue to enforce the regulation, you may face different forms of liability if doing so invites another lawsuit. So let me explain briefly the issue of damages and liability in this matter. The original case was filed pursuant to federal law, section 1983, which allows parties to bring federal cause of action for civil rights violations. It allows those parties to bring a claim to Federal Court. The problem with suing the State in Federal Court is the 11th Amendment. Typically what happens is that plaintiff's are restricted to prospective remedies. When they sue the State or state agency or officials in their official capacity, prospective remedies typically mean conjunctive relief, stop what you've been doing from this point forward. To obtain money damages against the State in Federal Court is more restricted because of the 11th Amendment and because of that restriction by the 11th Amendment, what plaintiffs typically do instead of suing individuals in their official capacity, they sue them in their personal capacity to get around the 11th Amendment. By suing individuals in their personal capacity, then they can seek money damages for violations of civil rights. Suing individuals in their personal capacities, however, also has some separate types of immunity. There's an absolute immunity and the qualified immunity that may apply. If Commissioners and Department personnel are sued in their personal capacity, the absolute immunity would apply to activities of the Board or Commission that are regarded as legislative in nature. Courts have held that when a Board or Commission of the State acts in a legislative capacity that it has absolute immunity from a suit in Federal Court for damages. The question, however, is in further enforcing or validating the regulations that exist. Have you acted in a legislative capacity or are you acting in an enforcement capacity? That's a question that the Courts will have to decide, but certainly that argument exists that you have acted in a legislative role in promulgating a regulation that is later found to be unconstitutional. But a question exists as to whether or not your absolute immunity would apply in this context because it's uncertain how the Court would view your role as either legislative or administrative. The absolute immunity, however, would probably not apply to Department staff,

the Director, and any individuals who have a responsibility for implementing and enforcing the regulation; however, they could possibly rely upon what is known as qualified immunity. Qualified immunity applies when a regulation is determined to be unconstitutional, but a Court finds that the law had not been clearly established when a state official or employee had violated somebody's rights. Until Judge Broomfield issued his opinion, arguably it was not clearly established that imposing a 10 percent cap on nonresidents was unconstitutional. With Judge Broomfield's decision, however, I think that question is more clear, that any regulation that mirrors the type of cap that the Court found unconstitutional is also unconstitutional, and so the ability to claim qualified immunity because the law is not clearly established probably would not prevail with regard to the existing regulation for bighorn sheep and buffalo, and so the ability to defend against a claim for damages in any future litigation is going to be jeopardized by these particular problems asserting immunity. Aside from injunctive relief and damages, you would continue to be liable for attorney's fees, irrespective of whether the plaintiffs could seek damages against any person individually or in their individual capacities. I can't sit here today and tell you that you will be personally liable and responsible for a damage claim. There are a number of issues that have to be resolved, but I wanted to give you an overview of the liability issues associated with civil rights claims in Federal Court and that liability issue increases once the Court has determined that a regulation is unconstitutional and you continue to try to enforce the same regulation, or a regulation that is very similar. I hope that provides an adequate overview of the potential liability.

COMMISSIONER MELTON: If we pursued with the 10 percent cap, what you're saying is the Commission itself can be sued personally because we have made a decision to ignore the injunction as far as the 10 percent cap is concerned.

MR. ODENKIRK: The State of Arizona does assume responsibility for its employees who operate within the course and scope of their employment. The question that I don't have an answer for you today, is whether or not a willful decision to do something in violation of the constitution is within the scope of the Director's employment or the role of a Game and Fish Commissioner.

COMMISSIONER GILSTRAP: Does that mean that decision is forthcoming?

MR. ODENKIRK: That question has not been asked. It would need to be asked for me to seek a response. That decision would have to be reviewed within the Attorney General's Office by lawyers who represent Risk Management and who have a responsibility for paying claims to determine whether or not they believe this type of action would be within the scope of the coverage. If you're seeking input on that issue, I would advise that you ask the Attorney General to provide some advice on that matter.

COMMISSIONER GILSTRAP: That might be a question that might be beneficial to us to have answered if there are others on the Commission who have an interest in that.

COMMISSIONER MCLEAN: What's the most efficient method to ask the Attorney General to answer that question, and hopefully, by the time any rule that we might open today would come for final vote?

MR. ODENKIRK: The best way to do it is not to ask for a formal opinion. The best way to do it is just to submit a request through me or a letter to the Attorney General asking for some direction on this matter.

COMMISSIONER MCLEAN: We need to get that done. Let's start the process.

MR. FERRELL: For the benefit of the audience, a thirty second brief history of what we've done in the last 30 days. At the August Commission meeting we brought to you 24 ideas on possible substitutes to the 10 percent cap. Most of those were even-handed, nondiscriminatory measures. I believe there were four that were believed to be discriminatory, of those 24 items, you kept nine on the table, seven were those even-handed, nondiscriminatory measures and two were believed to be, in some manner, discriminatory. Those are the nine items we're going to share with you today. What you told us to do is spend the next month evaluating those nine items, and you also directed us to make sure that when we came to you today that we offered you three options on the conservation bonus points since there was inadequate time to really pursue which was the best option last month, and to keep the Internet question separate on the agenda.

We can address some options on how to proceed with the Internet. Since that meeting we have held seven public meetings around the State, in which over 350 people attended. We also conducted a responsive management survey. We shattered all expectations; we had 7,474 respondents. That's the highest return we've ever had in a responsive management survey. We also have received letters from a couple of groups since our last meeting. There's a September 1 letter there from Brian Dolan of the Sheep Society and in that letter, Brian explains his association's preferences on how you might proceed today. The Yuma Rod and Gun Club sent you a letter on September 4 and that letter basically does the same thing. One, it withdraws their proposal that they kept on the table at your last meeting, and it explains their preferences on how you treat these issues we'll talk about today. Then we got a letter from Jim Umaucht, President of the Arizona Antelope Foundation, and he too, outlines his preferences on how you treat each of these items today. With all of that said, I think I'm ready to start talking about item 15b.

15.b. Notice of Proposed Rulemaking to Require All Big Game Permit Applicants to Purchase a Hunting License to Apply for the Draw.

Presenter: Steve K. Ferrell, Deputy Director.

MR. FERRELL: Item 15b is addressing the purchase of a license in order to be eligible for the draw. In a responsive management survey we asked how the public felt about this and there was overwhelming support. Seventy-two percent of the respondents supported this proposal. This is the one offered in August 2003 in Flagstaff, by Commissioner Melton and we all thought that this idea had real merit. In the 30 days that transpired after that meeting our attorneys had a chance to look at it, at least superficially, and explain to you a year ago this weekend at the September Commission meeting in Yuma, that there might be some implications with unlawful gambling here, and then this idea lost its wind for a while. But we've revisited this based on overwhelming public support and we've since asked the Attorney General for a formal opinion. The reason this idea is its own agenda item and its own rule package is that we wish to go

forward with rulemaking on this idea until we hear from the Attorney General that it's unlawful, assuming if he indeed says that. Of course if he says it's lawful, then we're well on our way to make this thing happen by April, but the reason we kept this by itself is if he does determine it to be unlawful, then we don't kill the other rules and they can move forward at the rate that you establish today. Item 15b is merely the notice of proposed rulemaking to make this item happen pending favorable consideration by the Attorney General. I would say that if we don't hear a ruling from the Attorney General by the time this runs its course, GRRC would more than likely hold this until the Attorney General did offer his opinion. That concludes my presentation on item 15B. Again, the language that's in your packet is not really final language yet, but we'll hopefully have that language in the next week so that we can show that final proposed language to you on Friday.

Motion: McLean moved and Melton seconded THAT THE COMMISSION MOVE FORWARD WITH THIS ITEM TO REQUIRE THE PURCHASE OF A HUNTING LICENSE TO APPLY FOR THE DRAW PENDING ANY UNFAVORABLE OPINION OF THE ATTORNEY GENERAL'S OFFICE.

Vote: Unanimous

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15e. Notice of Proposed Rulemaking to Create a Set-Aside Percentage of the Previously Capped Big Game Permits for Nonresidents.

Presenter: Steve K. Ferrell, Deputy Director.

MR. FERRELL: When asking the public about the set-aside option, again, an overwhelming support. Three quarters of the public asked responded in favor of this idea. This is the proposal that the Commission removed from the table back in June when we realized that if there was going to be any questions over the minimum tool that this was probably not as minimum a tool as the 10 percent cap was, so that's why we didn't pursue this any further after the June Commission meeting. The Yuma Valley Rod and Gun Club has since withdrawn their interest in this, but there's a couple reasons why it's still here today. One, is because you haven't withdrawn this at this point. You directed us a month ago to evaluate it, and that's what we've done and we want to share that evaluation with you now, but also because other groups have taken up the banner. Although Yuma has jettisoned this from their list, there are other groups that think this one has merit and needs to be considered further, and in fact some have married this proposal to the idea of just eliminating the sale of parts for all wildlife, non-edible portions statewide, and when you do that you basically have a proposal that's similar to Scott Bale's proposal without the 90/10 idea, so that's another reason why it's still here. But unless you make a positive disconnect from the Commerce Clause, this is clearly covered by the Commerce Clause and is unconstitutional.

Motion: Golightly moved and Melton seconded THAT THE COMMISSION REMOVE THE SET-ASIDE PROPOSAL UNDER AGENDA ITEM 15E FROM ANY FURTHER CONSIDERATION.

Vote: Unanimous

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15f. Consideration of Legislation to Amend the Statutory Provisions that Allow for the Sale of Parts and to Create "Commercial" and "Non-commercial" Big Game Tags, and

15.g. Notice of Proposed Rulemaking to Create "Commercial" and "Non-commercial" Big Game Tags.

Presenter: Steve K. Ferrell, Deputy Director

MR. FERRELL: We commonly call this "The Bale's Proposal," and in asking the public this question it is definitely a split opinion. Forty-six percent were in favor of it and 54 percent were not. In the language you've got statutory changes or changes to legislation that would be necessary to make this happen. You actually have two options here, and they both were offered by attorney Scott Bales. One, was the proposed commercial/noncommercial hunt permit-tag that would define or make the sale of parts unlawful only for that 90 percent of the tags that were set aside for the residents. In his other idea he offers an option of outright prohibition of the sale of all parts in the state. The next item is 15g, and this is the proposed rulemaking that would be necessary to make the Bales Proposal work.

COMMISSIONER MELTON: This one I have some real problems with. If we say that 10 percent of these animals are legally to be sold and 90 percent of them can't legally be sold, aren't we creating a real enforcement problem? It's kind of like the trapping issue where I can trap on this side of the road, but I can't trap on the other side of the road because this side's okay. I'm not a criminal over here, but over here, I am. My other comment, more than that, is the use of non-sale of parts. We've used deer hide and elk hide for years and years. A lot of handicap people use them to make garments and stuff, and there's a trade with the shed antlers. Is there any legal way that we can say they're illegal and still allow some of these crafts to use these items? It seems to me we're going to kick a whole bunch of people out the door simply to try to fix this little issue at the top and the people down at the bottom of the issue really aren't getting a whole lot of consideration.

MR. FERRELL: Let me answer your first question first, and that was, what's the enforcement of this going to be like? I wish I could tell you that enforcement would be easy if it were to pass, but I can't tell you that. Enforcement is likely to be difficult. You've got not only two types of animals harvested in the years after this becomes effective that will be treated differently, whether they're lawful parts or unlawful parts for sale, but all the parts that exist prior to the enactment of this law. So it's like you mentioned, the trapping law, that's a good analogy. Another one I've referred to is the difficulty we've had with the possession of tortoises after a certain date and whether those tortoises are grandfathered tortoises that were taken out of the wild before the date of prohibition, so there are going to be some enforcement issues. And we've had some fairly lengthy conversations on how to make it work, and I don't know that we've got one that appeals to all law enforcement officers in the agency, but certainly there

would have to be some sort of certificate of authenticity or certificate of legality that you could issue with that 10 percent that were harvested under the lawful sale type of tag, the commercial tag, and that would likely have to remain with the animal for as long as it existed in some form. In regards to your second question, a lot of those crafts and antlers are generated as either pickup heads or game farm animals, so those wouldn't really be affected by this law, but certainly any animal that's lawfully taken as well as pickup heads may not be affected. I think our pickup head policy would still apply to those sorts of things as it does now, and if you'll recall, that policy settles parameters of whether a pick up head can be lawfully possessed or not, and it has to do with things like freshness and that kind of thing. But certainly the other example you used where hides and heads that are given to charity. If those parts were offered for the purpose of giving them to charity so they somehow generate income for the charitable institution, they would more than likely be prohibited for 90 percent of the animals harvested in the state, at least those that are harvested under the recreational tag.

COMMISSIONER GILSTRAP: This is a new and innovative concept that's been brought to us and we've tried to hurry and work through it in light of the pressure that's been put on us as the result of Judge Broomfield's decision. This is the only item on this list that we're going to deal with today that relates directly or even indirectly to the Commerce Clause. We need to continue with the concept and work through the process of this option as opposed to merely making the decision up or down. In other words, I don't think we are completely ready. We have to work through these questions of giving hides to a nonprofit organization and at the same time, go ahead with the process of perfecting the language and correcting the language that could be put into statute at a future date, a future date being in this legislative session.

COMMISSIONER MCLEAN: I agree with Commissioner Gilstrap about 98 percent. I agree that we need to keep our eye on this issue of commercial versus noncommercial and that this is something we need to continue to work on. However, I think that those issues raised by Commissioner Melton are extremely valid, and I think we need to better discuss within the Department how to come up with some way of identifying those antlers, for example. I know I haven't had enough time to completely mull those issues through and, therefore, I think we need to keep it on the radar screen.

COMMISSIONER GOLIGHTLY: Occasionally, people need to refurbish their heads, or something, so where do they take them? They take them to the taxidermist. The taxidermist says this is junk, you have to get another cape. Where is he going to get another cape? Well, does he have to go out of state to find a cape that's legal? And then the button guy wants to make buttons and things like that, we're stopping that trade. Besides that, if I killed a world record mule deer, I would want to sell it. I just think it has to go.

CHAIRMAN CHILTON: I'm afraid it doesn't even address the commerce issue adequately, either. So, in other words, we would be cutting out people from the use of their hide or antlers or whatever, but we would be complicating and creating a large project to track the legality of these parts and we probably wouldn't be accomplishing the business of making it no longer commercial because we'd still be stuck with the fact that people traveling interstate are engaging in commerce.

COMMISSIONER MELTON: One further point is, if the 10 percent cap is illegal and we're turning around as a Commission developing another 10 percent cap, I think we're sticking our necks out legally, and I would refer back to Jim that I would like a little more legal analysis on exactly what our responsibilities would be or what our obligations would be legally.

COMMISSIONER GOLIGHTLY: This was the item that when we covered it at the last Commission meeting, several people in the audience said, not to worry about it, they would come to our aid and pay lawyer fees. So somebody out there has already determined we'll probably be in violation or they wouldn't have offered that.

Public Comment

MR. DOLAN: I'm Brian Dolan, President of the Arizona Desert Bighorn Sheep Society. I want to talk about the opportunity to draw a desert bighorn sheep tag in the State of Arizona. I would submit to you that there's not a resident out there that would be opposed to giving up this opportunity of selling heads, hides, and horns if he had to weigh it in the context that his opportunity of drawing one of our coveted tags was going to be reduced 30 to 40 percent, because that's the reality of it. There is so much nonresident interest in our desert bighorn sheep tags that it warrants an elevated discussion. I would appreciate it, and I know the society would appreciate it, and probably all the sheep hunters in the State of Arizona would appreciate it if we try to deal with bighorn sheep separately. If you guys are about to place a vote on something, I'd like to ask that you do it for elk or for deer or antelope, but please do it separately for bighorn sheep because I think there is some merit to it. This is the meat of today's discussion right here. The sheep hunters in the State of Arizona would appreciate it. We have far more to lose than any other species in the state, so we're asking you to keep whatever you do separate. We had chimed in with the same concept of the Yuma Valley Rod and Gun Club, that we think Rule D is still on the table. I understand you got the liability concerns, but if you can't take Rule D, then let's do a modified D. At least it's a step in the direction of following the judge's orders. I think if you show some effort to follow the judge's orders, your liability greatly diminishes. Another option is, if none of those others pass, then let's please grab a hold of this Bails Proposal and allow it to go forward for the bighorn sheep in the State of Arizona.

COMMISSIONER MELTON: Brian, I agree with you 100 percent. I think we can defend the 10 percent cap on bighorn sheep because you're talking about 85-90 permits. I think it's a little different if we have to defend on several thousand permits, but I think bighorn sheep is a specialty item within this state, and I think our defense could be very strong.

MR. DOLAN: What I was hearing earlier was that we were back to lumping everything together and it's important to have this species held separate. I think there's some merit to having a different rule for each of the species because if we ever have to defend our reasons for being discriminatory, each species has its own needs, has its own particular interest, and I think you're almost hurting yourselves by keeping them all lumped together.

COMMISSIONER MCLEAN: Brian, I agree with you and I think that sheep presents the Commission with a unique situation. But what I don't think we have done as a Department or as a Commission, and I don't think the Sheep Society has done it either, and that is to go out and

get an analysis to support what I think you and I believe to be true; and that is that because of the dramatically reduced number of total permits available for desert bighorn sheep, and because of the fact that there are virtually no other opportunities anywhere else in the United States to take sheep like there is in Arizona, that there would be this overwhelming impact on resident hunt opportunity. Frankly, I think if we go out and do our homework that we're going to find that it's not a 10 percent cap that we need, but perhaps it's a zero. I'm certainly going to try and help get us there, but I don't think it's going to come this year.

MR. DOLAN: The Sheep's Society is not looking for zero. Many of our members are out of state. I just don't want to have to answer the question next year when 30 percent of our 80 tags go to nonresidents. That's going to be a calamity, and it could cause a major mutiny in a division of our ranks. That's what I'm trying to prevent. I'm trying to be proactive. I know we can defend bighorn sheep, if given the opportunity. Had we known that bighorn sheep were going to be drawn into this thing, we would have certainly considered intervening and making sure that our interests were clear because I don't think that the arguments that we used to defend it, the species of bighorn sheep and the resident hunters of the bighorn sheep in the State of Arizona, had an opportunity to be represented.

COMMISSIONER MELTON: I come from a little different side. I really believe we can defend sheep, but the nonresident issue, I live in Yuma, and if I said to the folks down in Yuma, we're only going to have 10 percent of the dove hunters for nonresidents, I'd get run out of town because that place is sold out by nonresidents. Also, the funds that come to the Department is quite substantial, so we can't really bash the nonresidents too bad in certain areas, but I still think we can defend sheep in that context because it is such a trophy class animal. And, if there's some way we may want to put one or two tags on the market for the nonresidents to have a special draw, or something used specifically for banquet money for nonresidents to be able to do it. I think there's ways that we can satisfy somebody's out of state chance to get them or another method without this type of process.

MR. DOLAN: We believe that it's going to take additional legal action to settle this thing. That's the way our judicial system works, it's a series of Court cases until you finally do it. That's why one of the options that we're advocating, and it's similar to this proposal, is advance something that's different than the Rule E and the Rule D for that matter, but allow somebody to bring litigation against us, be more proactive during the legal proceedings that lead up to it so that there is this exchange of ideas and the dialogue, instead of the way it's been brought upon us now.

CHAIRMAN CHILTON: It may be easier to develop the science for the bighorn sheep than for the other species, and we're not dealing with the issue of all the big industry of the sheds and the other things that go with the deer and elk and the rest of it. I think it's a little more manageable. So if we pulled out the sheep and made it just noncommercial, that would give us another leg to stand on in the process of trying to build our science to say this is the best method for assuring opportunity to state residents that interferes the least with the opportunity of legitimate opportunity for out of state people. So if we were to pull out just the bighorn sheep and have a motion on that separately to do noncommercial, now you can't sell parts, do you think that would at least help the process as your organization sees it?

MR. DOLAN: Yes, I think that would be a step in the right direction.

COMMISSIONER MELTON: The Rod and Gun Club wants to test the sheep in a Court of law. That's the species that they want to bring to the forefront. If sheep can withstand the scrutiny and if we survive the sheep process, then we come back and simply do the same thing with deer and elk. The sheep are defensible.

COMMISSIONER GOLIGHTLY: In order to do that we have to change the law. We can't just do that. We need to ask Mr. Odenkirk his opinion on that. To me, you're just painting an orange blue. You're still discriminating.

MR. ODENKIRK: I'm not sure that limiting it to one species is going to provide any more advantage of applying it to all species, because the concept that Scott Bails is proposing is to get out from underneath the Commerce Clause. Let's eliminate the Commerce Clause as a constitutional obstacle, and if you do that, then it doesn't matter if you limit it to one species or apply it to all species, the impact is the same. If you think there's something unique about bighorn sheep, you've got to be able to articulate in a defensible manner what is unique about bighorn sheep, and what is the impact that nonresidents are having on bighorn sheep that is different than the impact on other species. I still think you're going to have a problem with needing to identify what impact nonresidents are having on bighorn sheep. Probably the easiest way to do that is to look at what was the level of resident opportunity existed prior to the cap, and then determine what that impact is going to be today, and you'll see what impact nonresidents have had, or will have, on resident opportunity. Without that information, you haven't shown that that particular cap has any relationship to the level of impact caused by nonresidents, but you may be able to find that out fairly quickly by looking at some existing data.

CHAIRMAN CHILTON: Can we have the Department start promptly to work on developing the information that would give us a basis for action on that direction?

DIRECTOR SHROUFE: That would be a good place to start, with the sheep population and the data we have from the recent draws.

MR. FERRELL: One of the things that we don't want to lose sight of is the discussion that we've had over the last month in light of you what we understand Broomfield's decision appears to say, and that is that you may discriminate, but in order to do it lawfully, you have to be able to identify what your nonresident impact is and apply those discriminatory measures to address just that amount of impact. We just need some data to be able to quantify that nonresident impact and we can do that with some existing data just by reconstructing the past draws by hunt number and where those hunt numbers would have fallen without that 10 percent cap. So what the rest of this stuff is trying to do, is basically provide some lawful means, because they're even handed nondiscriminatory measures that might in practice actually help residents while we're trying to come up with that quantification of nonresident impact. But I think we can get started on that pretty quick with just looking at the last couple of years of sheep draws.

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Meeting recessed for a short break

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Public Comment

JIM SCARANTINO: I've been asked to come over on very short notice and share some thoughts on behalf of United States Outfitters and the three plaintiffs in the Montoya case. I was one of their attorneys on that matter. I'm here in the spirit of cooperation, and we remain willing to work with the Department as we have been since 1997, but we are now at the end of seven and a half years of litigation and we do have a ruling by the Court. I've even told Mr. Dolan to please call us and maybe we can work some things out. So, it's an invitation to the Department and to the Commission that we remain willing to work on some things. The Supreme Court has ruled over and over again that a state may not hoard its resources for its residents. So say you were to do this 90 percent noncommercial, and say that you can't sell any of the parts. Well I presume that you would still allow the successful hunter who harvests the animal to consume it and to use the hide. In other words, to make a beneficial use, and you would deny 90 percent of the harvest to nonresidents. I think you're going to get into a lot of trouble on that, and I think the Commission's already a little nervous about going down that road, but I do want to tell you, I think you're going to get in a lot of trouble. Look at it this way, wildlife has to be regulated the same as other natural resources. The Ninth Circuit has made that clear and the Supreme Court has made that clear. There's no special exception for wildlife.

COMMISSIONER GOLIGHTLY: Thank you very much for some of your insights, and of course, some of those are your opinion, and you've been there. It was going on for years, this whole issue. You mentioned you were willing to work on something. Do you have that type of latitude with your clients to commit to work on bighorn sheep issue?.

MR. SCARANTINO: Bighorn sheep, specifically, I haven't been retained specifically on that. If you're going to have a legal challenge, it's not going to come from just anybody on the street. It's going to come from somebody with the wherewithal, the motivation, and the intuitiveness to stick with it. What I suggested to Mr. Dolan was to start those discussions. In that regard, yes, and at every stage in this litigation when something went par for us, I would invite the Department to work with us on things. Before we did this, we just didn't haul off and file suit. We came and had a face to face meeting and made some offers. So, yes, do I have the authority to say we're willing to work. I sent a memo titled Living with the Commerce Clause to Mr. Odenkirk suggesting some specific things that I think can be done that don't even come close to violating the constitution. It would definitely advantage residents over nonresidents.

COMMISSIONER GOLIGHTLY: If I can just go a little bit farther because I'm going to lead up to some other states. What are you going to tolerate? The judge didn't tell us what's acceptable, 20 percent, 0 percent. 2 percent.

MR. SCARANTINO: When we met in Phoenix in July of 1997, there were some efforts made to say a specific percentage would be acceptable. We could take this and go away, and I did say that if the judge rules, he's not going to say 20 percent. The whole thing is gone, and so we knew that from the beginning because the judge just can't say 20 percent, 30 percent, he struck it

down.

COMMISSIONER GOLIGHTLY: If you go from state to state, because you're definitely in my mind on a winning bandwagon on the cap issue, every state has a little different form of discrimination, or the Commerce Clause of the constitution. So how are you going to be able to say that in Arizona we're going to work with them on sheep. Why can't you sit down and just figure out what you're going to do and let us know?

MR. SCARANTINO: It's an issue I don't know much about the facts, and so my thought was to talk about it. We'd rather get something resolved than go on to another seven and a half years of litigation. The Ninth Circuit and Judge Broomfield did not say that any discrimination, any differentiation between residents and nonresidents is illegal, but if you're going to do it, first you have to have an adequate factual record with biological information, and economic information, all these other things that Arizona has not had. Nevada had nothing, by the way. Nevada just said, "We'll lose," and so they did the right thing. But if you can show those specific facts, if you can make that case, then there is room for considering some things.

MR. ODENKIRK: One thing you have to realize though, is that we are down the road after seven and a half years of being rebuffed on efforts to work something out, and so you also have to take that into consideration. And we do have the judicial decisions on our side.

COMMISSIONER MCLEAN: You come to us today and among other things you say, "Let's sit down and let's resolve this matter by negotiation as opposed to by adversarial babbling in the Court." I appreciate it, but I say to you, other than being able to speak for Mr. Tallman, of the seven thousand and some other sheep applicants, who else do you speak for? You came here today to say , if you come and sit down at my table, Mr. Tallman won't sue you, but all you've got to do is go find another one of X number of thousand of other clients.

MR. SCARANTINO: First of all, I wouldn't do that because then I would be in conflict with Mr. Tallman. I don't know the sheep hunting scene, and I've encouraged Mr. Dolan to figure out who those key players would be. I admit that, but I can only speak for one person in his client base. Certainly there are other folks out there, but not everybody's going to take this on.

COMMISSIONER MCLEAN: How do I sit down at the table with you and walk away from that table with an agreement that's going to be binding on the next guy?

MR. SCARANTINO: I do not suggest it would be binding, what I suggest it might be sufficient. It would be binding on those people you sat down at the table with for sure. And it may be sufficient to stave off other challenges, as in New Mexico.

COMMISSIONER GOLIGHTLY: I don't agree because I've been in this business long enough to know that tomorrow's plaintiff and tomorrow's plaintiff's bar, I mean, I can sell them all day long today and tomorrow all I've done is encourage somebody else.

COMMISSIONER MCLEAN: It has worked in the sense that they haven't been sued again.

COMMISSIONER MELTON: Yeah, Madam Chair. Jim, if we proceed with this sheep issue like we're proceeding, do you believe your client will sue?

MR. SCARANTINO: I suggest that, first of all, include him in the process to see where we go. If you go to zero, I can't tell you, I have not been retained to look at that issue. Let me make that clear. If you exclude all nonresidents from hunting sheep in this state, maybe not my client, but I think it's likely that if you go that far it will draw a suit. If Mr. Tallman and those sheep hunters he represents, are included in the process where something could be worked out, that's satisfactory. He would be bound by this agreement, but not the rest of the world.

COMMISSIONER MELTON: What do you believe your client would want to propose to this Commission to resolve the elk and the deer issue? Is there a magic number out there?

MR. SCARANTINO: Not to be disrespectful in that regard, but we've won, and we already have that ruling, and we're quite content with Judge Broomfield's ruling as far as elk and deer goes. What I think you need to do is to collect the data.

COMMISSIONER MELTON: What's going to come out of this is the fact that the nonresidents are going to pay the toll. There will be fee increases, license up front, there's a whole bunch of options that we can put forward legally that will restrict their availability or their desire for the nonresident tags. Aren't your clients or people that work for him going to be financially impacted by the fact that what's going to come out of this Commission meeting is that everything's going to be elevated at a higher cost?

MR. SCARANTINO: Before the past seven and a half years, we've been the ones suggesting an offer, so if there is a suggestion that would involve these sorts of things, we're welcome to hearing it. United States Outfitters and its clients have never attempted to challenge discriminatory fees that are imposed on residents and nonresidents. Our clients are happy to subsidize to a greater extent the game management in this state. But there are limits to how much greater your nonresident fees can be over your resident fees under the more forgiving privileges and immunities issue. Now, I want to make it clear for the record, United States Outfitters has had the opportunity to bring this issue up and we did not, but you do need to think about a Commerce Clause challenge to your fee structure and what that might involve because you may well get into the same strict scrutiny there. I will not be handling that case if it comes against Arizona. The United States Outfitters will not be involved in that case. They don't mind paying more, they just wanted better access. I hope that makes our position clear.

MR. FERRELL: As I understand it, we're at the point of trying to make a decision on 15f and g, and you've had public comments that generated a lot of discussion about whether sheep should be an exception to this, whether this whole thing is going to go as written.

COMMISSIONER GOLIGHTLY: I don't know where the Commission's headed with this, but I think I saw an opportunity, or a window. I hate to go forward with a lot of expense. I suggest we remove 15f and g, and let some things that have been talked about here proceed. We can always reactivate them. The work's done for the rule. The Department needs to know whether we're on or off, and I think we've asked for some legal advice.

CHAIRMAN CHILTON: I think we could go with a noncommercial hunt the whole way around and bighorn sheep without needing prior scientific studies. That's within our authority.

COMMISSIONER MCLEAN: I looked at Mr. Ferrell's proposal with regard to the amendments to ARS 17-371, where Steve has suggested modifying subparagraph E and adding a new subparagraph F and limit new paragraph F only to the sale of heads, horns, hide, feet, or skin, of bighorn sheep and leave off of that buffalo, bull elk, and antler deer north of the Colorado Rivers. The only way that I would be comfortable with even suggesting that would be if at the same time Mr. Ferrell could say that while the rule and proposed legislation is working down the pike, that the Department do the research we've just been talking about, look at the differentiation between resident and nonresident hunter opportunity prior to the imposition of the cap, and come back and tell us what that research shows. Then if that research shows, because we got to put a number in there if we're going to move forward today, if that research shows that we can support a 10 percent or higher cap based upon the pre-cap data, that we move forward with that, but if the research comes back and shows that we cannot support a 10 percent or greater cap, then at that point we pull the plug. That's the suggestion that I have that is less than all species, but still talks to the sheep issue as a separate and independent issue because my gut tells me that sheep and the uniqueness of sheep and the amount of time and money that residents spend on sheep, we can use that data to support a discriminatory differentiation on sheep hunts.

COMMISSIONER GOLIGHTLY: You know we have an offer by the side. Maybe there's a little doubt in their mind that they could win on sheep. Maybe their offering their hand. Why shouldn't we take that? Why shouldn't we go meet with these two guys right now? I hate to do all that work and find that there is no wiggle room, and they find out and say, well why do we need to meet? We've got you.

CHAIRMAN CHILTON: We need to do the science, anyway. We need to know where we are. We really need to know about all species, but because this is a smaller piece of the pie, we can probably find out easier.

MR. DOLAN: I contacted Mr. Scarantino prior to the Flagstaff meeting because I knew that I needed to find somebody to help craft a solution for us, and I'm still willing to contact him and if it pleases the Commission, I will continue to do that.

COMMISSIONER GOLIGHTLY: Always better to negotiate. Mr. Scarantino, what do you say to that?

MR. SCARANTINO: That has been our course in practice, to always invite negotiation ahead of time. I can't represent Mr. Dolan, but I can talk with Mr. Tallman tonight and get some ideas and get the ball rolling. I'll talk to Mr. Dolan and see what can happen, and talk some specific numbers and things.

Motion: McLean moved and Melton seconded THAT THE COMMISSION VOTE WITH REGARD TO AGENDA ITEM 15F AND 15G TO PROVIDE THE DEPARTMENT WITH DIRECTION ON POTENTIAL LEGISLATION, AND DIRECT THAT THEY PREPARE

LEGISLATION TO MODIFY THE APPROPRIATE STATUTES INCLUDING, BUT PERHAPS NOT LIMITED TO, ARS SECTION 17-371, BY ADDING MR. FERRELL'S SUGGESTED LANGUAGE IN PARAGRAPH E AND ADDING THE MR. FERRELL'S SUGGESTED LANGUAGE OF PARAGRAPH F, WITH IT BEING LIMITED ONLY TO HEADS, HORNS, HIDE, FEET, OR SKIN OF BIGHORN SHEEP, AND ELIMINATING THOSE OTHER SPECIES, SPECIFICALLY; BUFFALO, BULL ELK, AND ANTLER DEER NORTH OF THE COLORADO RIVER.

COMMISSIONER MCLEAN: I don't know if this gets included in the motion or just included in my thoughts, but that in accordance with a direction to the Department that they, with regard to sheep, begin the process of analyzing the precap sheep data to determine whether or not a 10 percent cap can be supported. We've got to do this and with all deliberate speed and bring that back to the Commission with the understanding that if 10 percent or better can't be supported, it would be this Commissioner's intent to pull the plug on the final part of that rulemaking, vote to not do it. And I also need to look at and one other member of the Commission staff.

COMMISSIONER GOLIGHTLY: I want to amend the motion to add, 'Except that migratory birds may be possessed and transported only in accordance with federal regulations, and illegally taken and subsequently confiscated by the Department.'

COMMISSIONER MCLEAN: That's all included in my motion.

COMMISSIONER GOLIGHTLY: Okay, there is no amended motion.

COMMISSIONER GILSTRAP: I think I heard earlier that in addition to this, Mr. McLean wanted a similar process for those species who were not included, species other than bighorn sheep?

COMMISSIONER MCLEAN: I do, but they would not been included within my motion that we would do that.

Vote: Unanimous (This motion is further discussed and withdrawn after agenda item 15.d.)

MR. FERRELL: I'd like to restate what we just did so I'm crystal clear on what I think your direction is. Essentially what we did in B and F is we've taken out antlers, and we've taken out wildlife and replaced it with bighorn sheep in e, and in f, we've removed the word antlers, and we've taken out everything except bighorn sheep in the list of those species. Then what our intent is to do is essentially, that's the Bales Proposal for sheep only. And you still have in the rule language then the 90/10 idea, and what we're going to do in the course of the next 30 to 60 days is do the research on previous years draws where we have preserved random numbers so we can run those draws without the 10 percent cap, and then that will be able to give an idea of whether that 90/10 is defensible or not. And what side of that 90/10 it goes will determine how you're going to proceed in the future. If it goes to where you can't defend the ten, where the nonresident side should have been higher, then you pull the rule language. If you see that it could have actually been something like 95/5, you allow this current rule language to proceed so it can be put into effect at 90/10 in 2005, and then you might choose to revisit somewhere down

the road if you want to tweak that 90/10 to be something more restrictive based on the data that would justify a greater restriction? And in the meantime we can be having some dialogue with our policies to determine what sort of input they might have on that proposal when we come to you in a month or two. So I would like to just read to you the statute language just so that we're clear. B will read: Subject to the provisions of subsection F, heads, horns, hides, feet, or skin of bighorn sheep lawfully taken or the treated mounts of specimens they have, may be possessed, sold, and transported at any time, except that, migratory birds may be possessed and transported only in accordance with federal regulation. F would then read: The sale of heads, horns, hides, feet, or skin of bighorn sheep taken on or after the effective date of this legislation is prohibited, have some proof that bighorn sheep was taken pursuant to a commercial hunt permit-tag issued by the Department. An exception shall not prevent the Department from selling heads, horns, hides, feet, or skin of a bighorn sheep that are illegally taken and subsequently confiscated by the Department or donated to the Department.

MR. ODENKIRK: As I read the language, you are allowing for the sale of bighorn sheep parts only, and that all other species will not be permitted to be sold?

MR. FERRELL: I've got a mistake on B. You actually need to leave the word wildlife in there because F is the exception to B, so you don't replace wildlife with bighorn sheep, so E essentially stays the same.

COMMISSIONER MCLEAN: You have to leave horns in there, bison also have horns.

COMMISSIONER GOLIGHTLY: Where does roadkill come into this?

LEONARD ORDWAY: Rather than having, 'does not prevent the Department from selling heads, horns, antlers, hides, and feet, or skin of wildlife of bighorn sheep,' just put a period right there.

MR. FERRELL: You wouldn't put wildlife in there?

MR. ORDWAY: No, just bighorn sheep. Just put the period right there, and then it doesn't preclude any exceptions because we gather wildlife from roadkill, so just leave it completely open as to however we acquired them.

MR. FERRELL: We need to do something similar to the proposed rulemaking in F15g. And we can word smith that right now or we can let the statute language that we just word smithed guide us in the final rule language that we're going to share with you in a telephonic Commission meeting on Friday.

COMMISSIONER MCLEAN: I move the latter.

Motion: McLean moved and Melton seconded THAT THE COMMISSION DIRECT THE DEPARTMENT TO RECRAFT THE RULE FOR PRESENTATION TO THE COMMISSION IN A TELEPHONIC MEETING NEXT WEEK SO THAT IT MIRRORS THE INTENT THAT WE JUST DID WITH REGARD TO THE STATUTE.

Vote: Unanimous

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15a. Notice of Proposed Rulemaking to 1) Create a Loyalty Bonus Point; and 2) Increase the Bonus Point Pass Percentage of the Big Game Draw from 10% to 20%.

Presenter: Steve K. Ferrell, Deputy Director.

MR. FERRELL: This is the loyalty bonus point, and the bonus point percentage pass. The only reason these are combined is they can be or they may be, whereas the others had a purpose of being extracted and in their own rule language. There's no hidden meaning here by combining these two things. You can pick one or the other, or both or neither. We would have had more of them lumped into one package had they not had nuances that prevented it. To give you an idea of what the public thought in our responsive management survey of the loyalty bonus point, it's overwhelming support, 83 percent. With this the way this rule reads is you get a loyalty bonus point if you have five consecutive years of application without break. It's not that you get a permanent point after five years, and you get to start to re-earn a second one in years six through ten. That's not the concept. The concept is, there's only one point and it's re-earned every year. You don't get it until you've had five consecutive years for any genus. If you lose it, you start all over, and it takes another string of five consecutive years to re-earn it. We asked the public whether it should be five years or some other number. Five years seemed to be the overwhelming favorite at 41 percent. Also, on the bonus point pass percentage, it increases from 10 to 20. Two-thirds supported it, a third did not. So that's twice the number on support as opposed to not in favor. That's all I had to present on those two items.

DON FARMER: I think that the loyalty bonus point is a very forward thinking proposal, and I support it with one caveat, and that would be the backward looking date of 2001 in which it's proposed to start accumulating the year. I think that that discriminates against some of our residents here in the State, particularly the young hunters just coming into it, they're going to have a five year or four year handicap to other hunters who have been applying for these tags for that number of years, and that would be my only comment on that.

COMMISSIONER GILSTRAP: I think that young hunters have a lot of years ahead of them, where some older hunters, might have an advantage to them of having an opportunity for a tag.

CHAIRMAN CHILTON: I agree. For those that have already shown that loyalty, we can promptly help them, and those who have just moved to the State, or are young, they'll have time to build some up.

MR. FARMER: This could be viewed as an elitist attempt, and I would caution against that. I would be as sensitive to the resident hunter as I could possibly be, and I try to offer these comments in the spirit of cooperation because I do support the concept.

COMMISSIONER GOLIGHTLY: That 10 percent pool on elk is down to a very small number,

and I don't know if those people know what we're contemplating on doing, or understand it.

MR. FERRELL: Right now for elk the maximum bonus points are held by four residents and two nonresidents. I've got it for three or four other species, too, if you'd care to have that. The way the 10 percent pool works, let's say there's 100 tags in the 10 percent pool, you first run those six people with 15 points through it, and then there's 94 tags left, and then you run those 58 people with 14 points through it until those 100 tags are gone, and then you run everybody through it, including those who didn't get drawn, so it's not just four people vying for the 100 tags. Another important point to make is, of course, in some of these species you have more people in that 15 or maximum level than you have tags for.

COMMISSIONER GOLIGHTLY: So what you're going to say is that we double up on them. It's going to be now 20 percent, so what are the odds that that pool doubles?

MR. FERRELL: That actually doubles the number of tags in the pool.

Motion: Gilstrap moved and Melton seconded THAT THAT THE COMMISSION VOTE TO APPROVE THE NOTICE OF PROPOSED RULEMAKING TO 1) CREATE A LOYALTY BONUS POINT; AND 2) INCREASE THE BONUS POINT PASS PERCENTAGE OF THE BIG GAME DRAW FROM 10% TO 20% AS PRESENTED BY MR. FERRELL.

Vote: Aye – Chilton, Gilstrap, Melton, McLean
Nay - Golightly
Passed 4 to 1

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15.c. Notice of Proposed Rulemaking to Create a Conservation Bonus Point.

Presenter: Steve K. Ferrell, Deputy Director.

MR. FERRELL: This gets a little bit more complicated. The response to the survey is pretty well split down the middle with a slight advantage to those in favor. In asking the respondents how many volunteer hours there should be, 20 and 40 hours were predominant. The next question on this subject is whether they should be accumulated over one year, two year, or unlimited timeframe, and the one year timeframe was the most popular. Then we ask the question, should they be permanent or lost when drawn. Lost when drawn was overwhelmingly favored, 78 to 22. Whether they should be allowed to accumulate or be limited to a single point. single point was favored two to one. And who should be responsible for keeping it, three quarters of the respondents said the Department should be. There's a couple of things I need to point out to you. I think the reason this is so split, you have those that are in the camp that feel that volunteerism is one of the cornerstones of the North American model of wildlife managing and should be rewarded. You have the others that are in the camp that will argue that this discriminates against those who are unable to go out and volunteer their time. There's another common theme that seems to be out there that volunteerism shouldn't be compensated. There are some other questions about how this would apply to disabled folks and youths and things like

that, so I want to attempt to address some of those things. We've chosen purposely not to apply an age limit to the eligibility of volunteers to participate in this, and I know that there are some liabilities or the concerns that the attorneys see with that Department decision at this point and they might recommend something different, but the reason we've chosen not to address the age limit is that there's no age limit on who volunteers now. Furthermore, to put an age in rule makes it pretty rigid. The other thing I want to address is the issue of permanency. That seems to be an issue that causes some people concern, and I think the Commission really needs to be considering the issue of permanency because once you issue a single permanent point, I believe you're locked in for perpetuity, which is longer than a lifetime, because you're going to have a difficult time removing permanent points, and if any one person has them, you need to make it fair that everyone have the chance to acquire them. So, we crafted two of those options that offer a permanent point. You might then revisit this in five years, and if you decide there are no ghosts in the issue of permanency, you can rewrite this rule to allow permanency at a later date, but right now we're kind of rushing the judgment here. We're putting a model together that we're not sure we figured out where all the issues are. At some point down the road the public might decide that this is not a good idea and wish those points would go away, and if you're already issued permanent points, you're locked in. So I might ask you to think about whether you're going to go with permanency.

SHELLEY CUTTS: The Fair Labor Standards Act and Arizona law both have a lot of detailed provisions about youth employment, and the kinds of activities that minors can engage in while on the job. There are certain categories of activities that youths, ages 16 through 17 cannot participate in. With respect to the youths of the age of 14 to 15, they are even more restrictions on what they can participate in. The Fair Labor Standards Act exempts volunteers from its provisions. Arizona law is less clear. Arizona law does not clearly exempt youths who volunteer from the prohibitions on certain kinds of work, but I think an argument could be made and defended that under Arizona law, volunteers are also exempted. But the question becomes one of even if youths are exempted from the protections of Arizona law and the Fair Labor Standards Act, it still becomes an issue for the Department as to what kind of activities they want youth to engage in during volunteer projects. Obviously, the restrictions in the Fair Labor Standards Act and Arizona law were designed to basically protect children from being harmed. Some of the types of activities that kids are not allowed to participate are things like; the operation of table saws and power equipment, working from a ladder. Youths 14 through 15 can't participate in construction at all. You could have a situation where parents might really want their teenagers to be able to participate in certain kinds of activities in order to earn a bonus point, but there's also the question of what if one of those kids gets hurt? What are the consequences for the Department if that happens? I don't suggest that kids should not be allowed to participate in a conversation bonus point program. My concern is just one of what kinds of activities the Department wants to have kids engage in.

COMMISSIONER MELTON: We will probably have to hire someone to coordinate the work process.

MR. FERRELL: We've just finished interviews for a volunteer coordinator position, and we'll probably have that person start in two weeks. A couple of things I wanted to touch on was other variables to our proposal. We chose WCC's model of 48 hours to get a point. We chose WCC's

model of where you have three years to accumulate enough hours to establish a point. Hours that are more than three years old don't count. Also, what happens after a project is certified, essentially, we propose, and this is different than what the conservation groups have proposed, is that we actually have one of them be a certified conservation bonus point record keeper. It would be very similar to a hunter education instructor, who's the one who actually keeps the record and submits the final results to the Department. There might be problems where we can't put somebody on there to actually collect the records ourselves. So there would be a training session put on that would be about a half a day long that would talk about how to keep records, and it would have some ethical things involved in the training, but it would be to the point, and they would actually then forward that record to the Department and the Department would be the keeper of that record then. But we wish to have a volunteer actually be the one that keeps the record on the project site.

CHAIRMAN CHILTON: I'm wondering about the one per year. One per year seems like a lot.

MR. FERRELL: That one per year is the maximum they could get. You couldn't get a second point in a year, so even if you worked 96 hours in that one year, you'd still only get one point. When you get down into those options, one or two, that weight of accrual would allow one to be earned every single 48 hours, so if somebody worked 200 hours, they'd get four points in a single year, and I think that's the issue you're trying to address. I think that what we're saying is what you're asking for, is to kind of keep that rate of accrual from being too rapid. Here, it's only one time per year. The reasons we went that way is because of the unintended consequences to that maximum bonus point pool, and if you did have a rate of accrual that was very rapid, then you'd have to do what we affectionately call the algebraic equation, in which case you would have to only credit a person's total bonus points with that number which would get him to the maximum that anyone else owns without including any of their bonus points. And this year that would be 15, so if somebody has 67 conservation bonus points and 12 regular points, they'd only be allowed to apply three of those conservation bonus points to bring them up to that maximum of 15. We'd recommend that if you were to choose an unlimited rate of accrual. And they would be lost when drawn.

COMMISSIONER MELTON: I like the A proposal simply because you lose those points once you're drawn for any species that has a cap on it, or has a bonus point on it, so it could be a deer, elk, antelope, or any other species that is covered, and you start over again.

MR. FERRELL: In other words, the only permanent point that's still in the equation is the hunter education point.

Motion: McLean moved and Melton seconded THAT THE COMMISSION DIRECT THE DEPARTMENT TO DRAFT THE RULE OPTION A, UNLIMITED LOST WHEN DRAWN AND ONE PER YEAR APPROACH.

Public Comment

JOHN KOLOSZAR: The Arizona Game and Fish Department has phrased the question of the conservation bonus point to the public. The phrasing of the question was so open-ended and so

nebulous, that there was destined to be thousands of different responses. With the thousands of different responses, the Department and the Commissioners now have the need of justification to keep the bonus point out on the grounds that there were too many ideas and no consensus. I am curious why the Department would put out a generic question when the detailed, well-thought out program has been in their possession for almost one year. For all the people that put their time and energy into this proposal it leaves a sense of being manipulated. We've been told that our time, our energy, and our passion have meaning to the Department, and yet, what we did seems to be a complete waste of time with no explanation as to why. Based on some of the conversation now, it seems that there is some misinformation or lack of information regarding the particulars of that plan. If the Department or Commission feels that the hundreds of volunteers is a bad thing, let us know why and say so now. At a recent show at the Phoenix Convention Center, people were asked by volunteers to read the wildlife conservation council's plan for the habitat bonus point. They were asked to sign it if they agreed. Only three people refused to sign the sheet, citing differences of philosophy. The rest of the individuals signed the sheet looking for a positive solution to the problems that they currently face in Arizona. I will state my sense of disappointment. Here is an opportunity to grow volunteerism, to change the landscape of work projects. I employ the Commission to not let a good thing die.

COMMISSIONER MCLEAN: Other than adding a volunteer as the record keeper, what did we just move to approve that you don't like?

MR. KOLOSZAR: What I was looking at was only the way it was presented to the public during the process. That was it. Basically, I was most concerned with the process that went on for the last four weeks where we had a program in place by the Wildlife Conservation Council, and nobody knew about it, and even yourselves didn't know about it.

COMMISSIONER MCLEAN: We knew about it.

CHAIRMAN CHILTON: We have a motion on the floor, is there something about the motion on the floor that you regard as bad?

MR. KOLOSZAR: Bad? No. Not a thing. My concern was the way it was presented, and for the last process, the public process, and that was it.

DON FARMER: I'm representing myself, and I'm one of the half of the hunting public who thinks that A, B, and C are inappropriate and would like an additional alternate number D, which would be none of the above. As a hunter, I have an interest in the Game and Fish bonus point system. I can appreciate the benefit the hunter education point has provided towards the successful graduation of the majority of Arizona's hunter, especially the young hunters in the State. I support any and all efforts to improve the habitat of Arizona, and to this end, the proposed conservation bonus point seems a great idea, but when I think about the implementation of the system, the maintenance of the system, and the operation of the system, it leads to far more questions than I have answers for. This proposal seems unfair to the other volunteer groups who have donated their time and expertise to the Department's mission and to those who cannot participate for one reason or another. I oppose that conservation bonus point concept as it's presented today. It seems it would create more red tape for an already complex

drawing procedure.

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Meeting recessed for a short break

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PETE CIMELLARO: I'm here representing myself. I have had the opportunity to work with the Wildlife Conservation Council in developing the program that was submitted last Fall to the Department and the Commission, and I'm strongly in favor of a conservation bonus point. There are a lot of differences of opinion about whether or not the conservation bonus point should go forward. What I want is the right product and I want it to be generally received by most sportsmen. Everybody has a diverse opinion, but it needs to be accepted and understood by most. The Department confused a lot of people with the way they presented this. You're trying to give it kind of a flavor of what the parameters are, top to bottom, and one in the middle. The meeting that I attended, there was 50 people at the Phoenix meeting, and I think there was only three or four that opposed it. It was overwhelming, but John Koloszar was there, I was there and a few others that went through this and explained what some of the options were, and explained some of the things that were yet to be decided, and people said this is a good thing. So overall, with some work we can do a very good job of getting this out to the sportsman and getting a better understanding and the best product. I would prefer that this be removed from the 10 percent package and be allowed to continue on its normal rulemaking process.

COMMISSIONER MELTON: We've had some real discussions down in Yuma and they're 99 percent behind this. There is some areas where there is a lot of concern about who's keeping records and how do we come out of this with a product that has some creditability, as far as, different organizations or whoever is a key person, but I guess this is kind of our foot in the door, and we need a lot of input on how we're going to maintain some quality record keeping on these projects, and that's my only concern. I know a lot of the groups, and they're all credible groups, but there are groups out there that may not be involved at the present time that want to get involved and may not have the ethics that we have within the groups that we have now. So I see some obstacles that we're going to have to overcome, but I'm really 100 percent behind this. I would like see a quality product come out of this, and I would like see some pretty tough scrutiny on the process, and the signing in, signing out or whatever it takes to be able to verify actual on the job people that are there, not coming at eight o'clock and leaving at nine. There's got to be some pretty good protocols put together for this.

MR. CIMELLARO: Have you seen the proposal that the WCC put forward? It entails every detail you just spoke of. We're with you, it has to be a credible program, and that's why we thought it was really important that the Department administer that.

CHAIRMAN CHILTON: This is the proposal that's had the most thought and the most time of all of our matters that we're considering, so, and if you look at this, this is a suggestion of a direction to sort of aim at to the Department. This isn't like we're voting on final language.

CHAIRMAN CHILTON: I am personally in favor of going ahead with direction to pursue the development of this project.

COMMISSIONER GOLIGHTLY: Has anyone applied a pencil to the cost or the financial burden and time or anything. Is there any money associated with this whole program being administered by the Game and Fish Department?

MR. FERRELL: We have not put a pencil to paper to figure out what the exact costs are, but we believe the costs to be manageable if we can make some of those recordkeeping chores be accepted by the conservation groups, so that we don't have to be at every single project. That one volunteer coordinator I mentioned, this is only a small portion of that person's job. This person is going to be doing many things and not just coordinating volunteer labor, but also trying to do the finances of what a volunteer labor is valued at so that we can apply that towards our match.

COMMISSIONER GOLIGHTLY: All I've heard so far is if the organizations are going to be in charge of awarding bonus points. What about the common guy that needs to go out and work on a project, are we going to keep track of that for him? Every project may not be an organization project, so we take that burden on this time and they do it next time or how does that work?

MR. FERRELL: It's clear the Department's going to have to provide ideas for volunteerism because there will be people who don't get a chance to volunteer through the established clubs and organizations. The Department will have to find a way to let those people volunteer for something meaningful. So you're right, there's going to be administrative costs the Department will need to bear, not to mention just the mechanics of applying the point prior to the draw to make sure that point is counted.

Vote: Aye – Chilton, Gilstrap, Melton, McLean
Nay - Golightly
Passed 4 to 1

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Meeting recessed for a short break

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15d. Consideration of Legislation for the Creation of an Application/Administrative Fee for the Conservation Bonus Point Program.

Presenter: Steve K. Ferrell, Deputy Director

MR FERRELL: This is the legislation that will be required to establish the application administration fee for the conservation bonus point. There would be a \$10 fee that merely, when you go to apply to cash in your 48 hours to get credit for a point, you fill out a form and enclose \$10, but we need legislation to do that because it's a brand new fee.

Motion: McLean moved and Melton seconded THAT THE COMMISSION VOTE TO HAVE AN APPLICATION FEE OF \$10 FOR THE CONSERVATION BONUS POINT PROGRAM.

COMMISSIONER MELTON: I think this would really irritate a few of the people to have to pay \$10 for a bonus point. Is this a maintenance fee?

MR. FERRELL: The genesis of this idea was in the WCC proposal which was intended to try to defray the costs that the Department would incur for administering the program.

Vote: Unanimous

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15.f and g, revisited

MR. FERRELL: There might be some confusion as to the data to prove that ten was a good figure. We were kind of thinking, I believe, in the context of a 10 percent set-aside, but what we actually moved was the Bails Proposal which had a 90 percent recreational tag and a 10 percent commercial tag that was equally attainable by residents and nonresidents alike. Under that proposal you won't ever be able to predict, without years of experience, what percentage of that will actually go to nonresidents. It could be a 99/1, it could be a 98/2, and therefore, the science that you're asking us to give you comfort with might be meaningless in that case. I just want to clarify that you were really talking about the Bails Proposal and that 10 percent is up for grabs between residents and nonresidents or did you mean 10 percent set-aside.

COMMISSIONER MCLEAN: It's a maximum of 10 percent set-aside, which would be participated in, and that will skew the numbers, but I think the numbers are still important because we need to look at those, and look at it in the sense that if we are going to establish any kind of a basis for any kind of a cap, be it a set-aside or be it a full blown 10 percent cap, we still have to look at those numbers.

MR. FERRELL: The intent of your motion, is that 10 percent set aside for competition between residents and nonresidents and not a 10 percent set aside for nonresidents.

COMMISSIONER MCLEAN: That's what I want to stay with.

CHAIRMAN CHILTON: How does that fly with the Court, because it doesn't fly, as far as I can see. That's not quite how I understood it.

MR. ODENKIRK: If that's the way you're going to proceed, then I think you've created a complete disconnect between the two proposals. What you need to do with regard to obtaining some background data to show the impact of nonresidents, is to show what percentage of nonresidents are eroding resident opportunity and the data may come back that nonresidents are taking 10 percent of the permits on average and that's the impact that they're having on resident opportunity. My guess is the data is not going to show that nonresidents should be limited to one or ten percent of all permits, but that's what the result will be under the Bails Proposal because you're going to have 80 percent of all permits going to residents. An additional 10 percent of the permits will then be available to all applicants on an equal basis and if the statistics show that nonresidents only get maybe 20-25 percent of the permits in an open competition, then they're

only going to get 25 percent of that 10 percent, which is a fairly small number, and I don't think it's going to approximate anywhere near the impact that they're actually having on resident opportunity. If you're trying to blend the Bails approach with the concept of establishing some data to support your decision, then probably the better approach is to have the legislation prohibit the sale for any bighorn sheep parts entirely, and then by rule, have a set-aside for bighorn sheep that would be exclusive for nonresidents. Then, hopefully the data will then come around to support that. The better idea is to have the data first, but your idea is to try to establish a set-aside for nonresidents and hope the data supports that eventually. But I think you're going to need to do a set-aside approach as opposed to a cap approach on 10 percent. You really have two separate strategies with this proposal. One, is with regard to the Scott Bails concept. By eliminating the sale of parts, you are trying to eliminate commerce from hunting, and if you can eliminate commerce, then hopefully the Courts will see that the Commerce Clause doesn't apply, and so your restrictions on nonresidents aren't subject to the strict scrutiny and analysis. The other strategy is to provide better justification for your cap or for your set-aside to show what impact nonresidents have historically had on resident opportunity, and by limiting nonresident permits to that traditional impact, you have a better argument to say that you've narrowly restricted your regulation to meet the problem that exists with nonresidents. You've done a better job of meeting the strict scrutiny standard the second time around.

COMMISSIONER MELTON: I was voting under the understanding that we were going with a 90 percent, 10 percent for nonresidents, and if the data brought us within that 10 percent cap, then that was a go. If the nonresidents came over the 10 percent cap, it was my understanding of the motion, that we would readdress the issue or revote it, but as long as that stayed within that 10 percent cap range from the documentation that's provided, then were going to proceed. That's what I thought I voted on.

CHAIRMAN CHILTON: Right, 100 percent noncommercial for one species, bighorn sheep, but 10 percent set-aside for nonresidents, and then to look and see what our historical data said the impact of nonresidents was prior to the imposition of the 10 percent cap, and if it's less than 10 percent, then we don't have much of a leg to stand on to limit to 10 percent if the prior impact without the cap wasn't very great.

COMMISSIONER GILSTRAP: My understanding is that the motion was very clear, and the question was to develop data, and that data would give us the additional information to make that final decision. It wasn't in conflict with anything. Until we have the data, we are either going forward with the motion, or we would pull it.

MR. FERRELL: The way the motion reads right now, and the way that Commissioner McLean affirmed that he intended it to read, was that this: That 10 percent goes to nonresidents, that nonresidents will successfully compete for, say 30 percent, of the sheep tags. Now, if it is just wide open, they'd get 30 percent of 82 tags this year, but under this proposal, if they're only competing for 10 percent of the tags, they would actually get 30 percent of 10 percent, or that would be 3 percent of the tags. So then what we would have to do is look at that data and see if we can run it in a tiered structure like that, and I'm not yet sure we can, but if we can, then we can look to see if the data supports a 3 percent nonresident tags for sheep. If it doesn't, then you need to readjust your formula so that you can get the percentage that's necessary to be justified

by your data.

MR. ODENKIRK: If the Commission is going to adjust its numbers at some point in the future, it runs the risk that it won't be able to get this in place by next year's draw. I'm looking at the timeline for adopting rules. If in 30 days we have new information about the impact of nonresidents, we're going to have to go back at some point in the rulemaking process and start over so that we comply with the requirements of the Administrative Procedures Act, and then build back in the time for it to be completed and put into effect. What I've been told is that if we don't issue a notice of proposed rulemaking by a week from Monday and don't have any glitches in the process, we can get the rule in effect so that it can be used for the Fall hunts.

COMMISSIONER MELTON: Do we need to revote this, Steve? Evidently, we've got different opinions on what we voted on here.

CHAIRMAN CHILTON: Can we have a clarification, or, you know, something. What sort of point of order do we need to make sure that we're in agreement on what we think we voted on?

MR. FERRELL: I suggest that we go back and withdraw both of those, 15.f and g.

Motion: McLean moved and Melton seconded THAT WE WITHDRAW BOTH VOTES 15F AND G.

Vote: Aye – Chilton, Melton, Golightly
Nay – Gilstrap, McLean
Passed 3 to 2

COMMISSIONER MCLEAN: Now we're going to revisit f and g, and with regard to that, I move that we amend the Statute 17-371, so as to make the sale of non-edible sheep parts noncommercial, except as to those stated in Steve Ferrell's subparagraph F and add to that the roadkill language from Leonard Ordway.

CHAIRMAN CHILTON: Okay, now you don't mean just to have that noncommercial? You mean what?

Motion: McLean moved and Gilstrap seconded THAT THE COMMISSION VOTE TO AMEND STATUTE 17-371, TO MAKE THE SALE OF NON-EDIBLE SHEEP PARTS NONCOMMERCIAL, EXCEPT AS THOSE STATED IN MR. FERRELLS'S SUBPARAGRAPH F F AND ADD TO THAT THE ROADKILL LANGUAGE LANGUAGE FROM MR. ORDWAY; AND FOR THERE TO BE A NONCOMMERCIAL RESIDENT ONLY SHEEP, 10 PERCENT COMMERCIAL SHEEP DRAW WHICH IS PARTICIPATED IN UNDER THE 'BALES' PROVISION BY BOTH RESIDENTS AND NONRESIDENTS AND I WANT THE STATUTE TO SAY THAT AND I WANT THE RULE TO SAY THAT.

Vote: Aye – Gilstrap, McLean and Gilstrap
Nay – Chilton, Melton, Golightly
Not passed – 3 to 2

Motion: Melton moved and Golightly seconded THAT THE COMMISSION VOTE 100 PERCENT OF THE SHEEP ARE NONCOMMERCIAL, AND THERE IS A 10 PERCENT SET-ASIDE FOR NONRESIDENTS, AND THEN IF DATA SUCCEEDS THAT, WE HAVE BEEN ADVISED IT COULD GO UP TO 15 PERCENT, BUT ANYTHING ABOVE THE 15 PERCENT, WE'LL HAVE TO READDRESS THE ISSUE IF THE DATA DOES SHOW THAT PARTICULAR HIGH A LEVEL.

COMMISSIONER MCLEAN: Even though these would be 100 percent noncommercial, the Department would still have the right to sell under the combination of the Ferrell and the Ordway exceptions.

COMMISSIONER GOLIGHTLY: I was going to offer two separate motions. One, to create a legislation exactly like you said it. We're going to need legislation. And then Joe's motion would stand on its own.

Motion Amendment: Golightly moved and Melton seconded THAT THE MOTION BE AMENDED TO INCLUDE THE LANGUAGE THAT HE'S STATED WITH THE AMENDMENT OF TITLE OR ARTICLE 17-371, WHICH MAKES THE SALE OF SHEEP PARTS ILLEGAL EXCEPT FOR THE FERRELL AND ORDWAY AMENDMENT.

Vote: Unanimous

Motion: Melton moved and McLean seconded to MAKE THE RULE AND THE STATUTE GO TOGETHER.

Vote: Unanimous

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16. Options for Increasing License Fees and Application Fees.

Presenter: Steve K. Ferrell, Deputy Director

MR. FERRELL: Here is kind of the cliff notes version of the entire chapter of your three-ring binder. The two columns in the middle, Average of the West and Maximum Price in the West, all of those figures down that row include tag fees and license fees. In order to show you what the actually increase proposed in license fees and tag fees, the three columns on the right had to separate those things, so you could actually see what a new antelope tag would be as opposed to a new hunting license, so what I'm trying to say is those two middle columns are only valuable in seeing where this would put you elsewhere in the West. It's the right three columns that show what the new price is actually going to be. Option A is what we call, Smart Pricing, and I think one of the Commissioners actually coined this term last month when we talked about the merit that we have when you increase the fees across the board by a certain percentage, or I should say the lack of merit, because that's what we had done in the past and that just perpetuates this unwanted balance of where residents and nonresidents fall relative to one another in the various

licenses and tags. We tried not to get too carried away with increasing resident license fees, because after all, the license fee is your entry to the sport. If you don't have the license, you don't hunt big game, and some hunters don't want to hunt big game, so we didn't want to price that person out of the game. We were kind of gentle on the resident fee increases so that the smaller game hunter and quail hunter could get in the game relatively easily or stay in the game. So the increases in resident tags, then, are a little bit greater in proportion to existing than the license fees were, and what we did was we looked at what we thought the market bare? Some of the variables that we looked at with that was what are the other state's charging for their residents, and we did the same then for the nonresidents. The last time we talked about a general yardstick of five to one? Well, when we looked at that for what it is across the West, that 5 to 1 is pretty scarce. It's often 7 to 1, 9 to 1. In one instance it was 27 to 1. So, I don't know that that needs to be a hard and fast rule, of course we might have a Court decision that tells us eventually whether it is. But option A, across the board is roughly 7 to 1 between residents and nonresidents. Then what we did with option B, is we took the Smart Pricing for residents and we took that resident fee as a starting point and established the resident fee with a multiplier, and that multiplier was a little in excess of 8 to 1. So option B, there's greater disparity between resident and nonresident licenses. Then option C, we essentially did a 20 percent increase to the residents. Took the maximum fee for each category in the West and added 25 percent to that, so that one has the greatest disparity between resident and nonresident prices. Residents are a 20 percent increase, and nonresidents, running them up to the maximum in the West plus 25 percent on top of that.

COMMISSIONER MELTON: The figures that we're seeing down at the bottom line here, those figures do not reflect the fact that we have now, or are in the process of, making everyone buy their license up front.

MR. FERRELL: That's correct. All that's doing is taking what the 2003 license sales where and multiplying them by the increased price, so the actual revenues would be increased even more, perhaps, if we made people buy licenses to get in the draw, unless of course, by resistance was some unexpected percentage that actually cancelled that revenue.

COMMISSIONER MELTON: I think we already proceeded with that, have we not? As far as today, did we not already put that in, so that will be a multiplying factor to the revenues generated if that, in fact, goes through the process. So that could be a substantial difference if you're talking about 6,000 sheep tags that's buying a license that they didn't have to buy before because they didn't get drawn.

MR. FERRELL: Another thing I need to point out is that the maximum that we're talking about, that's running it up to the authority to allow that much. You know, that's creating the new ceiling in Title 17. It doesn't necessarily require us to start the next license year with that new price. That's just trying to get the authority to go up to that amount before we go back to the legislature for a new license fee increase.

COMMISSIONER MCLEAN: So you would anticipate phased in increases?

MR. FERRELL: Absolutely, and that would be at the Commission's direction as well. If you

recall what we did last time, we ran licenses up to the maximum, but we only ran tags up to two-thirds of the authorized amount and then the last came this past year.

COMMISSIONER MCLEAN: Has there been any thought given to whether or not that process would be the same for the resident versus the nonresident?

MR. FERRELL: You could treat those differently. As far as strategies go, I think we found that it was a better strategy to have fewer jumps even though they might have been greater in magnitude than launching them up a dollar or two every year, like some states do. The only caution I would have is if you did jump to the ceiling on the nonresidents and didn't move the residents in a like manner, you could start to make that 7 to 1 become much wider than that, and then you could end up with that privileges and immunities concern.

MR. FERRELL: Depending on what direction you give us tonight, this bill doesn't need to be dropped until January, so it gives us time to go on the road and get public input, obviously on that.

MR. DOLAN: Several members of our organization did some work with this array, and our analysis and found that if you actually did a weighted average of the states, the percentages were more like 1 to 9.3 for bighorn sheep, 1 to 9.8 for elk, and 9 to 9 for deer, and 1 to 7 for antelope, and since this thing originally got started in response to apparent high demand of our wildlife here, it seemed to us that we ought to be at the higher end of that scale. So rather than looking at a 1 to 7 ratio, we would advocate that we actually look at a 1 to 9 ratio of residents to nonresidents. One of the options we'd like to propose would be an option D, where we'd approach a 20 percent increase in resident fees and then apply the ratio to the various nonresident tags. I'm offering the suggestion that we apply it for all the species because, obviously, deer and elk. I believe the revenue, once it was generated, the number would fall somewhere between the Smart Pricing and option A, but we didn't really know the formula on how that was applied. We also recognize that this fee structure that we're contemplating is being initiated probably by two things; one, in response to the Montoya matter, because a lot of people thought that if we raised prices we might discourage nonresident participation. There's also, obviously, a need that the Department needs to do as far as recovering costs. In addition, I'd like to point out that there are a lot of other things we can do, wildlife conservation wise, to increase the number of tags that we have issued, and these numbers are forecasted on very depressed tag numbers, and I'm not happy with 82 sheep tags. I want to get it back to 100, 110, and I imagine the Deer Association, if they wanted to chime in, they'd want their deer tags to be back up where they're at, too. So I think we need to dip into our tool bag and try to look at our tool bag of conservation activities and see if we can't objectively justify that in the future things are going to be a little bit better. I'd hate to think that our whole entire wildlife program is dependent on whether or not it rains in this state. I think there are a lot of things we can do to help mitigate some of the effects when it doesn't rain.

MR. FERRELL: I think what Brian just proposed would actually put the figure somewhere between our option B and our option C, because if you run the math on sheep for option C, I think it's 15 to 1, and they're all high like that. They're more than 1 to 9, so I think B is like 1 to 8 and C is in that 1 to 15, or in that ballpark anyway.

COMMISSIONER MCLEAN: You said we had until January to run these numbers or to drop this bill?

MR. FERRELL: That's true; however, we do need to share with the Governor a draft bill in November, but the bill itself wouldn't need to be dropped until January.

COMMISSIONER MCLEAN: Because I'd sure like to have some hunter input. I look at the numbers and I am personally, generally comfortable with the Smart Pricing approach. I don't like a percentage across the board. In this option A, the Smart Pricing, I think what I really like about that is in the second page where you have some premium deer hunts and you have some premium elk hunts. We have some quality hunts in this state. Some of those early bull hunts are really desirable, and I like the way that has been split out, where the other two options doesn't have anything available in that, so I'm in there.

COMMISSIONER MCLEAN: You didn't break out any separate pricing on youth hunts.

MR. FERRELL: That's true. Not on the tags, just the general hunting license, but we could do that.

COMMISSIONER GOLIGHTLY: Why don't we have these discussions after we floor it to the public? You just lock in on Smart Pricing, and say go run with that, and then we'll adjust it as we hear input. And then let the youths, let it stay where it is, based on the Smart Pricing, the smartest thing to do is not increase it too much on the youth tags.

MR. FERRELL: In fact, that is our proposal. The youth hunts don't exhibit an increase. If you look at Page 1, Class F Combo, the third row in that box is youth, and it's currently 25/50 and we propose it stay at 25/50 in all three options.

COMMISSIONER MCLEAN: That's license only. I'm talking about the tags.

MR. FERRELL: We haven't done that yet, but we can be directed to do that real easy.

MR. CIMELLARO: You're zeroing in on option A, Smart Pricing, may I call your attention to the guide's license. This was the most disproportionate increase in the entire proposal. Guide's license is currently \$100, and you can see the average in the west is \$225, most expensive is \$350, and under Smart Pricing, \$500? Why?

DANA YOST: The statutory authority for guides right now for nonresident is \$500, so when we looked at this, we simply looked at bringing the resident equal with that to the \$500, rather than reducing the nonresident use. You still have the flexibility to set a rule, whatever those fees would actually be, so this would only be the statutory authority basically making resident and nonresident equal without taking nonresident down and giving the legislators something back, so-to-speak. That was the thought behind it anyway.

MR. FERRELL: The other part of that is that resident and nonresident guides need to be charged

the same amount, and because of the other lawsuit, it's a commercial license, and you can't have disparate fees for a commercial licenses, so because the nonresident guide is \$500 in statute now, Dana is proposing raising the nonresidents to \$500. One other thing I'd point out is, not only is it the two months that we have or three months to get some public input, but the legislative process is public, and certainly the rules process is public, if it gets past the legislature and in statute, then you got a whole rule process you get to go through in which you get public input on your actual pricing.

COMMISSIONER MCLEAN: Would Commissioner Melton amend his motion to add, 'but on youth tags for deer, elk, and javelina, that there be no increase as there wasn't on the youth combo license?

COMMISSIONER MELTON: I can accept that.

Motion: Melton moved and McLean seconded THAT THE COMMISSION ADOPT OPTION A, SMART PRICING, BUT ON YOUTH TAGS FOR DEER, ELK, AND JAVELINA, THAT THERE BE NO INCREASE AS THERE WASN'T ON THE YOUTH COMBO LICENSE.

Vote: Unanimous

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14 a. A Briefing on Options to Modify or Eliminate the Online Internet Application Process.

Presenter: Steve K. Ferrell, Deputy Director

MR. FERRELL: This one gets a little tricky because the response to management survey really doesn't support what the Department's recommendation's going to be, and I'll explain why. To get to the bottom line, if you look at the response to management survey, this one that asks whether or not the full tag amount should be charged up front. We went through the credit card thing earlier today, so the electronic funds transfer would be the only way to do that, and it's an even split on that. The next one was due away with the online application process all together. Seventy-nine percent of the public doesn't like that idea. Leave it as is, is a little bit closer vote, 58 to 42. The Department's recommendation is going to be to get rid of the online draw for at least one more year. Go back to the old system, the manual draw, for at least one year, maybe two, and the reason for that is we are not at all comfortable with the electronic funds transfer yet. There are still too many unknowns. We aren't confident that there is an Internet vendor out there who can name that tune successfully, so our confidence is low that we can make that happen. Considering some of the other tweaks that we've done to the draw here, and considering some of the online problems that we've had with our vendor in the last couple years, or longer, we think it would be best to go back to keeping it simple and do away with the online draw. And then, once electronic funds transfer or credit cards or whatever comes up in new opportunities in one or two years out, revisit going back to an online draw. In public meetings we've held since the last Commission meeting, you usually hear a big round of applause when you talk about the Department, perhaps, getting rid of the online draw. Obviously, that public opinion isn't supported by the response to management survey, which we expected, quite frankly because as

we explained earlier, there's a lot of public that seems to like the online draw that's being quiet at this point, and that was evidenced by the number of those who use it; . Seventy-six percent of hunters do use the online draw.

CHAIRMAN CHILTON: Steve, didn't you do that on the Internet?

MR. FERRELL: Exactly. But my point is the draw, 76 percent of the applicants are using the Internet. So, anyway, I guess what we're saying here, is because of the uncertainties of the new equation that we're creating with these tweaks to the draw, and our lack of confidence in the present vendor and electronic funds transfer at this time, we're recommending that we go back to a manual draw. The only other option that we feel can be considered, is to leave it as is, and not go to electronic funds transfer, and not go to the credit card thing.

COMMISSIONER MCLEAN: This is the 21st century. I am going to be embarrassed if this Commission and this Department in this century can't put together an online draw, an automated online application and an online draw. The only way that I can even think about it, is a one year, and only one year, sunset of the online application process with a do it right or else understanding that we will get back into the 21st century, and we will do it right by the 2006 Fall hunt draw application cycle.

Motion: McLean moved and Gilstrap seconded THAT THE COMMISSION VOTE TO RECOMMEND THE DEPARTMENT GO BACK TO A MANUAL DRAW FOR ONE YEAR.

Vote: Unanimous

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14b. Notice of Proposed Rulemaking to Amend the Process for Online Internet Applications for the Big Game Draw.

Presenter: Steve K. Ferrell, Deputy Director

MR. FERRELL: Dropping the Internet for one year doesn't require you to pass the rule language in F14b. It can remain in the rulebook, and then it's there to help facilitate the return of the online draw.

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25. Future Agenda Items.

COMMISSIONER GILSTRAP: The headquarters committee would like to make a report to the Commission in this October meeting.

DIRECTOR SHROUFE: We're putting that down on the list.

CHAIRMAN CHILTON: We heard mention today of issues of no access to the spur cross. Can

we look into what the situation is there?

DIRECTOR SHROUFE: I'm sure we'll find an agenda that we can meet. Mr. Ferrell has a couple other items.

MR. FERRELL: One was to invite the Director of the Arizona Department of Wildlife Resources to the October Commission meeting to comment on the Phelps Dodge versus State of Arizona, and another was to continue to pursue the Black River burn.

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19. Consideration of the Requirements of R12-4-114(D) as they Apply to Future Big Game Drawings for Hunt Permit-Tags in Light of the July 13, 2004, U.S. District Court Order in the Matter of Montoya v. Manning, CIV98-0239 PHX RCB.

Presenter: Steve K. Ferrell, Deputy Director

MR. FERRELL: This is the item that you've been briefed on in Executive Session under legal advice by Mr. Odenkirk, and this is to decide how you're going to handle R12-4114D in the future, which is the present cap on sheep and buffalo.

COMMISSIONER MELTON: Have we not addressed the bighorn sheep in this plan, and now we're down to buffalo, or do we still have to address both these issues?

DIRECTOR SHROUFE: We've got more time on the bighorn sheep issue than we do on the buffalo. The buffalo issue is coming up here on a draw immediately.

Motion: McLean moved and Golightly seconded THAT FOR PURPOSES OF THE SPRING 2005 DRAW ONLY, THAT WE NOT APPLY THE 10 PERCENT CAP ON THE SPRING BISON DRAW.

Vote: Aye – Chilton, Melton, Golightly, McLean
Nay - Gilstrap
Passed 4 to 1

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Motion: Melton moved and McLean seconded THAT THE MEETING ADJOURN.

Vote: Unanimous

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The meeting adjourned at 9:30 p.m.

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Sue Chilton, Chairman

Joe Melton, Vice Chairman

Michael M. Golightly, Member

William H. McLean, Member

William H. McLean, Member

ATTEST:

Duane L. Shroufe
Secretary and Director